89-201

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MELVIN DEAS,

Petitioner,

vs.

JUDITH LEVITT, In Her Official Capacity As City Personnel Director, and NEW YORK CITY DEPARTMENT OF PERSONNEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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QUESTIONS PRESENTED

1. Does a state violate an individual's due process rights to be fairly considered for civil service promotion and to make effective use of the appeal process guaranteed by state and city law, by allowing a city to illegally deny petitioner a promotion, to delay the processing of his appeal, to fail to comply with an administrative ruling ordering his reinstatement to the eligible list for promotion, and instead to end the eligible list?

2. Does the New York Court of Appeals' decision seriously undermine the ability of the federal courts to order relief in employment cases raising race, sex and disability discrimination claims against the city or state unless the scoring of the written test for the civil service position is challenged?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

This petition for certiorari arises out of the New York Court of Appeals' reversal of a judgment of the Appellate Division, First Department, which held that respondents' refusal to restore petitioner to an eligible list for a civil service position after he had successfully appealed their disqualification of him violated his right to due process under the State and Federal Constitutions.

OPINIONS BELOW

The opinion of the Court of Appeals is to be reported at 73 N.Y.2d 525, 539 N.E.2d 1086, 541 N.Y.S.2d 958 (1989) and is printed in Appendix A at 1a–24a. The opinion of the Appellate Division, First Department is reported at 139 A.D.2d 1, 530 N.Y.S.2d 807 (N.Y. App. Div. 1988) and is printed in Appendix C at 28a–56a. The opinion of the

Supreme Court is not reported and is reprinted in Appendix D at 57a–59a. The opinion of the New York City Civil Service Commission is not reported and is reprinted in Appendix E at 60a–64a.

JURISDICTION

The order and judgment (remittitur) of the New York Court of Appeals was issued on May 4, 1989 and entered on May 10, 1989 (App. B at 25a–27a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions involved in this case are the United States Constitution, Amendment XIV (Due Process Clause) (set forth in pertinent part in App. F at 65a) and the New York Constitution, Article V, § 6 (Merit and Fitness Clause) (set forth in pertinent part in App. H at 67a).

The statutory provisions involved in this case are: 42 U.S.C. § 1983 (set forth in App. G at 66a); New York Civil Service Law §§ 50(4), 56, and 61(1) (set forth in pertinent part in App. I at 68a); and New York City Charter and Code §§ 810(a), 812(c) and 813(a) (set forth in pertinent part in App. J at 71a–72a).

The regulations involved in this case are: § 3.6 of the Rules and Regulations of the New York State Department of Civil Service, N.Y. Comp. Codes R. & Regs. tit. 4, § 3.6 (set forth in App. K at 73a); and § 8.3.3 of the Rules and Regulations of the City Personnel Director, Department of Personnel of the City of New York (set forth in App. L at 74a).

STATEMENT

This case arises out of one man's quest for the relief he won after he successfully pursued the administrative appeal process established by New York State and City law. All

parties concede that petitioner was erroneously disqualified by respondents on the basis of a non-job-related past disability and removed from his standing near the top of the eligible list for civil service promotion. Petitioner diligently pursued the available administrative remedies and, after long delays for which petitioner was not responsible, respondents were ordered to reinstate him to the list. However, respondents refused to certify him to the list, and instead terminated the list and thereby denied him the relief to which he was entitled. Respondents have thus been able, so far, to nullify the decision overturning their disqualification of petitioner and thereby sabotage the appeal process guaranteed persons like petitioner by state law.

A. The Facts

Petitioner is a forty-five year old man who has worked in civil service positions for the New York City Transit Authority (hereinafter NYCTA) for over twenty-three years and at all times has performed that work in exemplary fashion. In 1982, he was promoted to the position of Bus Maintainer Helper B (hereinafter MHB). As an MHB, petitioner inspected, installed and repaired bus equipment, and he operated buses within the depot. Petitioner received a license to operate a bus in November 1982 after successfully completing the NYCTA's bus operation training program.

In October, 1983, petitioner applied for a promotion to the position of Bus Maintainer A (BMA). A BMA is responsible for maintaining, inspecting and repairing the bodies and structural equipment on buses, and, like the MHB, operates buses within the depot. Petitioner passed the BMA examination and was ranked third on the eligible list for the position.

In August 1984, when a position became available, petitioner reported for a medical examination, a prerequisite to appointment. Petitioner had fully disclosed in a medical questionnaire that he had been treated for an emotional problem thirteen years previously. Therefore, as part of the

examination, he was seen by the NYCTA's psychiatric consultant. After a brief interview, the consultant recommended that petitioner not be permitted to operate a bus -- a task he had been performing flawlessly every work day for approximately two years. The consultant cited no evidence to support his recommendation and, in fact, reported that petitioner exhibited none of the symptoms associated with the illness for which he had been treated thirteen years previously. Petitioner was disqualified on the basis of this recommendation, in total disregard of his demonstrated ability to operate a bus.

Promptly afterward, in September 1984, petitioner appealed his medical disqualification to respondents, thereby commencing the administrative appeal process state and city law make available to disqualified civil service candidates.[1] Respondents took no action on petitioner's appeal for over five months. In March 1985, respondents' psychiatric consultant saw petitioner and, on the basis of a brief interview, concurred with the conclusion of the NYCTA's consultant because of what he believed to be the risk of recurrence of the 1971 illness. Respondents' consultant, like the NYCTA's consultant, did not identify any current mental disability on petitioner's part and provided no medical support for his view that the condition treated in 1971 could recur after a fourteen-year period in which petitioner had exhibited absolutely no medical problems. Respondents disqualified petitioner for the BMA position on April 9, 1985.

Petitioner immediately appealed respondents' adverse determination to the City Civil Service Commission, as

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[1] *See* N.Y. Civ. Serv. L. § 50(4) (McKinney 1983 & Supp. 1989); N.Y. City Charter § 812(c) (N.Y. Legal Pub. Corp. 1989); Rules and Regulations of the New York City Personnel Director § 8.3.3.

provided for by state and city law.[2] He challenged his disqualification on the grounds that he had no mental disability that made him unfit to perform the duties of a BMA then or in the future and that his disqualification was based solely on his treatment fourteen years before. Petitioner argued that the disqualification violated his rights under State and Federal laws which prohibit discrimination on the basis of a past or perceived disability that does not currently prevent an applicant from performing job functions.[3]

Respondents did not submit their reply to the Civil Service Commission until late September 1985, five months after petitioner initiated his appeal. Because respondents' reply contained inaccuracies, petitioner had little choice but to request a hearing before the Commission. Seven months elapsed before the Commission notified the parties, in April, 1986, that a hearing would be conducted on June 16, 1986. Despite this two-month notice, respondents requested an adjournment five days before the scheduled hearing because their counsel had still not made arrangements to meet with the psychiatric consultant who had examined petitioner.

The Commission conducted a hearing on July 9, 1986 and on August 14, 1986, issued a decision in favor of petitioner, finding him qualified for the BMA position and ordering respondents to place his name back on the eligible list. (App. E at 60a-64a.) The Commission concluded that petitioner had no disability that would prevent him from performing the BMA functions currently or in the future. The Commission issued its decision *two years* after petitioner's initial disqualification.

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[2] N.Y. Civ. Serv. L. § 50(4) (McKinney 1983 & Supp. 1989); N.Y.C. Charter § 812(c) (N.Y. Legal Pub. Corp. 1989); Rules and Regulations of the New York City Personnel Director § 8.3.3.

[3] N.Y. Exec. L. §§ 292.21, 296.1(a) (Mckinney 1982 & Supp. 1989); 29 U.S.C. § 794 (1982 & Supp. V 1987).

Petitioner's protracted ordeal to vindicate his rights resulted in a hollow victory. Respondents did not reinstate his name on the eligible list for the position. Twelve days *after* the Commission issued its decision, respondents published a new eligible list. As a result, the eligible list from which petitioner was to be certified expired. The eligible list had been in existence for approximately two and one-half years and had a year and a half to run before its statutory expiration date.[4] At the time the list expired, four BMA positions were available and petitioner could have been considered for those positions. Respondents refused to certify petitioner after they terminated the list, claiming that his right to relief died with the list. Petitioner's request that respondents establish and place him on a special eligible list so that he could be considered for the BMA positions that were to be filled imminently -- a procedure it had used in similar situations in the past -- was denied.

B. Summary of Proceedings

Petitioner filed an appropriate proceeding in state supreme court[5] challenging respondents' action on the grounds (*inter alia*) that it deprived him of his right to due process under the State and Federal Constitutions.

The state supreme court, in a decision dated May 6, 1987 (App. D at 57a-59a), held that petitioner's due process claim

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[4] *See* N.Y. Civ. Serv. L. § 56 (McKinney 1983). The BMA eligible list was established on March 21, 1984 and it expired on August 26, 1986. The list had contained thirty-seven (37) people and the NYCTA had exhausted the entire list in selecting people to fill BMA positions. The NYCTA had also filled twenty-eight (28) BMA vacancies with provisional employees before a new list was established. The new eligible list was published on August 27, 1986.

[5] The proceeding was brought pursuant to Article 78 of the N.Y. Civ. Prac. L. & R., §§ 7801-7806 (McKinney 1981 & Supp. 1989).

was without merit. The court did not explain the basis for its determination.

The Appellate Division reversed the lower court in a 3 to 2 decision (two justice plurality with one justice concurring), holding that respondents had denied petitioner due process under the State and Federal Constitutions by refusing to certify him on a special BMA eligible list (App. C at 28a–56a).

In analyzing the due process claim, three justices expressly agreed with petitioner's claim that he had a property interest both in being considered for the BMA position and in using the procedures established under New York law to appeal his disqualification. The majority held that under this Court's decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), "the right to invoke a statutory adjudicatory procedure is a constitutionally protected property interest." (App. C at 41a; 34a.) The court noted that while respondents' rules required that appeals be *filed* within thirty days, no city or state statute or regulation restricted petitioner's right to relief to the duration of the eligible list. Thus, respondents' refusal to certify petitioner after he won his administrative appeal violated his right to due process:

> The fact is that acceptance of respondents' [position] would make petitioner's ability to invoke his right to appeal entirely subject to the arbitrary and capricious whim of a municipal authority. A city agency can simply, inadvertently or with deliberation, delay the appeal process. Sufficient delay will inevitably result in the expiration of the eligible list. By that means, an applicant would be deprived of his right to appeal through no fault of his own, and he would be totally without legal resort. Indeed, a legal right which can be so easily circumvented, whether unintentionally or wilfully, is no right at all.

(App. C at 41a–42a.)

The court rejected respondents' argument that the New York Court of Appeals' decision in *Tanzosh v. New York City Civil Service Commission*, 44 N.Y.2d 906, 379 N.E.2d 166, 407 N.Y.S.2d 638 (1978), precluded the certification of an eligible who had succeeded in his administrative appeal and had therefore not filed a judicial action prior to the expiration of the eligible list. The plurality held that any distinction between administrative and judicial actions was invalid after this Court's decision in *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982), which had been decided after *Tanzosh* (App. C at 35a–39a).

Two justices dissented, concluding that respondent's right to use the statutory appeal process was limited to the duration of the eligible list, a rule the dissent viewed as mandated by the New York Constitution's merit and fitness requirement (App. C at 47a–56a).[6]

On May 4, 1989, in a 4 to 3 decision (three judge plurality, one judge concurring), the New York Court of Appeals reversed (App. A at 1a–24a). While acknowledging that petitioner had a "right to consideration for ... appointment" (*Cassidy v. Municipal Civil Service Commission*, 37 N.Y.2d 526, 337 N.E.2d 752, 375 N.Y.S.2d 300 (1975), the plurality held that right was not a property interest protected by due process (*id.* at 8a–9a). Further, the plurality held that whatever property interest petitioner had in being considered for appointment was limited by the duration of the eligible list (*id.* at 9a). The plurality opinion sought to distinguish this case from *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), by asserting that "the requirement that a civil service applicant demonstrate eligibility prior to the expiration of the eligible list is not a procedural limitation on the ability of the applicant to assert his or her rights; it is 'merely one aspect of

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[6] N.Y. Constitution, Art. V, § 6 (McKinney 1987 & Supp. 1989).

the State's definition of that property interest'" (*id.* at 10a (citation omitted)).

The plurality imposed two pre-conditions not set forth in state law or regulation on the procedural appeal rights accorded candidates for civil service positions. Although those candidates can appeal their disqualification to respondents and then to the Civil Service Commission, candidates who successfully pursue this procedure are entitled to relief only if (1) they file a judicial action before the eligible list expires (relying on *Tanzosh v. New York City Civil Service Commission*, *supra*, 44 N.Y.2d 906 (1978)) and (2) they challenge the scoring of the qualifying examination itself (relying on *Mena v. D'Ambrose*, 44 N.Y.2d 428, 377 N.E.2d 466, 406 N.Y.S.2d 22 (1978). (App. A at 6a-7a.) Actions brought by individuals like petitioner challenging discrimination on the grounds of race, sex or disability are unavailing once the eligible list expires, even where, as in petitioner's case, a favorable administrative ruling has already been won *before* the list has expired.

Of the four justices comprising the majority, one, recognizing "the peculiar procedural immobilization of and inequity to this petitioner", would have overruled the *Tanzosh* case and reversed, but felt constrained against doing so in this instance (*id.* at 12a-13a).

The three justices in dissent would have held that petitioner had

> a property interest under state law -- i.e., the right to be fairly considered for promotion solely on his merit and fitness and the complementary right to preserve that interest by making effective use of the review and appeal process guaranteed him by state law.

(*Id.* at 14a).

The dissenters disagreed with the majority's distinction between applicants raising challenges to the scoring of the qualifying examination and other challenges:

> That the error here was in medical diagnosis instead of scoring [of the competitive examination] is irrelevant; both types of errors mischaracterize the applicant's qualifications and cause someone with less standing to be considered in violation of the [merit and fitness clause of the state] constitution.

(*Id.* at 17a.) The dissenters would have held that petitioner, like the applicant in *Mena v. D'Ambrose*, *supra*, 44 N.Y.2d 428 (1978), had demonstrated that there were errors prior to the expiration of the eligible list and was therefore entitled to relief (*id.* at 17a–19a).

The dissenters would also have held that the denial of that relief on the grounds that a judicial action had not been filed before the eligible list expired violated petitioner's right to due process under *Logan v. Zimmerman Brush Co.*:

> An applicant, such as petitioner, who ranks in the top three for a particular position *must be considered*, as a matter of statutory right, unless there is some valid ground for finding the applicant unfit (*see*, Civil Service Law §§ 50[4]; 61).
>
> Petitioner's state property interest includes the right to be fairly considered solely on the basis of his relative qualifications. It also includes the concomitant right not to be excluded from consideration for a merited appointment by being mistakenly disqualified. It is to assure this protection that the State has devised the appeal procedures which petitioner used here (*see, e.g.* N.Y.C. Charter §§ 812[c], 813[a][3]–[8], [b][5]).

(*Id.* at 19a–20a (emphasis in the original, footnote omitted).)

In concluding that respondents' imposition of a duration-of-the-list procedural requirement violated petitioner's due process rights under *Logan*, the dissenters stressed five factors: (1) that the pre-condition upon which relief depends -- filing a judicial proceeding before the eligible list expires -- is purely procedural; (2) that government delay and not any fault of petitioner was responsible for petitioner's failure to meet the pre-condition; (3) that "[p]etitioner had a substantial interest in being considered for promotion and in erasing the erroneous determination of psychological unfitness"; (4) that "[n]o substantial state interest is furthered" by the pre-condition; and (5) that the classification resulting from the majority's decision is "entirely arbitrary and produces incongruous and patently unfair consequences [citations omitted]." (*Id.* at 21a-23a.)

REASONS FOR GRANTING THE WRIT

I.

The Ruling of the New York Court of Appeals Conflicts with the Decisions of this Court Concerning Procedural Due Process Rights; That Conflict Should Be Resolved.

Summary

The New York Court of Appeals' conclusion that petitioner's state statutory right to be considered for civil service appointment and his state statutory right to appeal his disqualification were limited by the duration of the eligible list is in conflict with several recent decisions of this Court.

It is well established that "[p]roperty interests ... are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law ...." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In this case, state law provides applicants for civil service positions with a right to be considered for appointment. State and New York City law also provide applicants

who are rejected for a civil service position on the basis of a physical or mental disability the right to appeal their disqualification through an administrative process. These state and city law provisions create two distinct kinds of property interests for applicants: first, an interest in being considered for appointment; and second, a property interest in the appeal process and its result. Both are constitutionally protected.

In refusing to recognize petitioner's property rights in this case, the New York Court of Appeals ignored established decisions of this Court. First, in clear disregard of *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court of Appeals dismissed petitioner's statutorily created property interest in being considered for appointment, stating simply that petitioner's "right to consideration" was not a legally protectible interest. Second, the Court of Appeals ignored this Court's teaching in *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982), that due process precludes a state from denying potential litigants recourse to established adjudicatory procedures "when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" *Id.* at 429–30 (citation omitted). To avoid the holding in *Logan*, the court attempted to recast what is clearly a procedural limitation on petitioner's statutory right of appeal into what it termed a limitation on the property interest itself.

A. The Court of Appeals' Decision Directly Conflicts with this Court's Holding in *Board of Regents of State Colleges v. Roth*

New York State law clearly creates a right to be considered for civil service promotion or appointment upon passing the requisite competitive examination. Section 3.6 of the Rules and Regulations of the New York State Department of Civil Service and section 61 of the New York Civil Service Law provide in pertinent part:

> Every candidate who attains a passing mark in an examination as a whole...*shall be eligible for appointment* to the position for which he was examined and *his name shall be entered on the eligible list in the order of his final rating*....

N.Y. Comp. Codes R. & Regs. tit. 4, §3.6. (emphasis added).

> Appointment or promotion from an eligible list to a position in the competitive class *shall be made by the selection of one of the three persons* certified by the appropriate civil service commission as *standing highest* on such eligible list....

N.Y. Civ. Serv. L. § 61 (McKinney 1983 & Supp. 1989) (emphasis added).

Since petitioner attained the third highest score on the qualifying examination, he was entitled, in accordance with these provisions, to have his name placed on the eligible list and to be considered for appointment. That he did not have a "mandated right to employment" (App. A at 8a) does not diminish his property interest in being considered. As this Court has said:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is the purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

Petitioner clearly had "more than an abstract need or desire" for and "more than a unilateral expectation of" his right to be considered for promotion. That right is explicitly set out in statute and regulation. Thus, petitioner had a "legitimate claim of entitlement" to be considered for appointment. Indeed, the state has protected petitioner's right to be considered by guaranteeing him -- again by statute[7] -- a right to appeal respondents' determination to disqualify him from consideration. If the state thought his interest in being considered for appointment did not rise to the level of a property right, there would have been no reason for it to provide a right of appeal.

In this connection, the Court of Appeals' reliance on *Martinez v. California*, 444 U.S. 277 (1980), is misplaced. The Court of Appeals likened this case to *Martinez*, stating that as in that case the state had simply defined petitioner's property interests in a limited way (App. A at 10a).

In *Martinez* this Court held that a California statute granting immunity to the parole board for any injury arising from its decision to release a prisoner did not violate the due process rights of the survivors of a 15 year old girl who was murdered by a parolee. The Court noted that "'when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity....'" (*Id.*, 444 U.S. at 282, n. 5 (citations omitted)).

That is not what the state did in this case. The key difference between *Martinez* and the instant case is that state and city statute and regulation created for petitioner a right to be considered and a right to appeal. The court below has imposed on those rights a species of statute of limitation whose operation can be neither controlled nor predicted by

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[7] *See* N.Y. Civ. Serv. L., § 50(4) and N.Y.C. Charter § 812(c), set out in note 9, *infra*.

persons asserting their state-created property rights. While *Martinez* teaches that the state is free to limit property rights (or even to eliminate causes of action), this Court's decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), makes clear that the state may not grant a property right with one hand and then impose crippling procedural limitations on that right on the other. As this Court stated in *Logan*:

> [T]he State [is] free to create substantive defenses or immunities for use in adjudication -- or to eliminate its statutorily created causes of action altogether.... The 120-day limitation in the [state statute], of course, involves no such thing. It is a procedural limitation on the claimant's ability to assert his rights, not a substantive element of [his] claim.

Logan v. Zimmerman Brush Co., supra, 455 U.S. at 432-33. The limitation placed on petitioner's ability to assert his rights is clearly the kind of procedural limitation this Court disapproved in *Logan*.[8]

B. The Court of Appeals' Decision Directly Conflicts with this Court's Holding in *Logan v. Zimmerman Brush Co.*

The second property interest asserted by petitioner is virtually identical to that recognized by this Court in *Logan v.*

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[8] This Court also held in *Martinez* that the there was a rational relationship between the state's interests and the immunity statute. The Court noted that the state could rationally conclude that imposing tort liability would have a chilling effect on the parole decision-making process and prolong incarceration. Encouraging parole release would promote rehabilitation of inmates as well as security within the prison. 444 U.S. 277, 282-83 (1980).

In this case, the limitation imposed on petitioner's ability to assert his rights is not rationally related to the state's interests. *See* discussion *infra* at 18-22.

Zimmerman Brush Co., 455 U.S. 422, 428–30 (1982). In *Logan*, an employee filed a complaint with the State Human Rights Commission challenging his job disqualification under the Illinois Fair Employment Practices Act, but his complaint was dismissed because the Commission had not held a fact-finding hearing within the statutorily required time period. Logan claimed that the dismissal of his complaint violated due process. *Id.* at 426–27. The Court held that Logan had a property interest in the right to use the adjudicatory procedures established in that Act:

> Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." (Citations omitted.) Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: "While the legislature may elect not to confer a property interest,...it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.... [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms."

Id. at 432 (citations omitted). *See also, Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 539–42 (1985).

Logan clearly controls this case. Petitioner had a state-created property right to appeal an erroneous disqualification

(*see* N.Y. Civ. Serv. L. § 50(4); N.Y.C. Charter, § 812(c)).[9] He appealed his disqualification within the 30 days mandated by the City Charter and -- despite respondents' continual delay -- diligently pursued the appeal. Petitioner won his administrative appeal before the Civil Service Commission, which ordered that his name be restored to the list. Respondents delayed complying with the direction of the Commission and instead published a new list.

Thus, like the petitioner in *Logan*, this petitioner, through no fault of his own and for reasons entirely beyond his control, has been denied a remedy because of a time limitation of which he was not even aware. Like the 120-day limitation

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[9] Civil Service Law § 50(4) provides in pertinent part:

> Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible....
>
> (b) who is found to have a physical or mental disability which renders him unfit for the performance of the duties of the position in which he seeks employment, or which may reasonably be expected to render him unfit to continue to perform the duties of such position....
>
> No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

Section 812(c) of the City Charter provides in pertinent part:

> The civil service commission shall have the power to hear and determine appeals by any person aggrieved by any action or determination of the personnel director made pursuant to paragraph[]...six...of subsection a ...of section eight hundred thirteen of this chapter and may affirm, modify, or reverse such action or determination. Any such appeal shall be taken by application in writing to the commission within thirty days after the action or determination appealed from.

Petitioner was disqualified by respondent Personnel Director pursuant to City Charter § 813(a)(6).

in *Logan*, this time limitation -- the premature demise of the eligible list -- was made the pre-condition upon which his right to relief now depends.

Indeed, the instant case is even more egregious than *Logan*. First, petitioner Deas has already demonstrated before an impartial trier of fact that his disqualification was erroneous and that he is entitled to relief; in *Logan*, no proceeding had taken place and no finding of discrimination made.

Second, the procedural pre-condition that has been placed in petitioner's way affects not only his right to be heard, but his right to enjoy the relief he obtained after pursuing the appeal procedure established by state law.

Third, in *Logan*, the petitioner was appealing the actions of his employer to an impartial state agency that negligently allowed a time limitation to run. In this case, petitioner was appealing his disqualification by *respondents*, it was *respondents* who were primarily responsible for the two-year delay in petitioner's appeal being heard and decided, and it was *respondents* who -- after their decision against petitioner was overturned -- took actions that terminated petitioner's right to relief. Thus, as the Appellate Division pointed out below, "by its own inaction, the Department of Personnel was able to nullify the entire statutory appeal process." (App. C at 39a.)

As in *Logan*, no substantial governmental interest is advanced by the procedural rule imposed by the Court of Appeals in this case.[10] *Logan v. Zimmerman Brush Co.*,

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[10] Indeed, the Court of Appeals' decision is contrary to state interests to the extent that it undermines the administrative and statutory appeal procedures established by state law. In future, persons aggrieved by respondents' actions will have to file judicial proceedings immediately upon their disqualification by respondents, without waiting for the outcome

(continued...)

supra, 455 U.S. at 435. There is no question that the state has an interest in promoting applicants from a list that reflects merit and fitness. *See* N.Y. Const., Art. V, § 6; N.Y.C. Charter, § 810(a). Clearly, according petitioner his right to be considered for promotion would not have adversely affected that interest. Indeed, in this case, it was respondents who violated the state's interest in merit and fitness, over a period of two years: It was respondents who disqualified petitioner, who was flawlessly performing a similar job for the same agency and who ranked third on the eligible list, on the flimsiest of grounds; it was respondents who delayed his appeal; and it was respondents who, in his stead, appointed some twenty-eight provisional employees, none of whom had ever taken the competitive examination.

The New York Court of Appeals has recognized in similar circumstances that the state's interest in merit and fitness is actually advanced by giving relief to applicants in petitioner's shoes. In *Mena v. D'Ambrose*, 44 N.Y.2d 428, 377 N.E.2d 466, 406 N.Y.S.2d 22 (1978), the Court of Appeals held that when applicants have filed a judicial action to challenge errors made in their ranking on the eligible list, and the list expires before they can be certified, a special eligible list should be created and applicants aggrieved by the errors should be considered from that special list:

> [t]he petitioners' scores were improperly computed resulting in an inaccurate eligible list *as to them and*

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[10](...continued)
of their administrative appeals in the Civil Service Commission, in order to preserve their right to be considered should the eligible list expire during the pendency of their administrative appeals. The imposition of a requirement that a judicial action be pending at the time the eligible list expires in order for relief to be granted will impose prohibitive costs on disqualified applicants, interfere with the administrative appeal process, which is designed to provide a fair resolution to matters that agencies are uniquely well-qualified to handle, and waste judicial resources.

> *they were aggrieved thereby*. Thus they are entitled to the continuation of a special eligible list, consisting of [their names].

Id., 44 N.Y.2d at 433 (emphasis added).

Significantly, in *Mena*, the civil service list at issue had expired by force of law after four years. The Court of Appeals' order permitting creation of a special eligible list came three years thereafter. Thus, in *Mena*, seven years passed between the competitive examination and the court's order mandating certification of applicants to a special eligible list. In the instant case, the eligible list expired after a two and one half year period. Petitioner's certification to a special eligible list, therefore, would not have violated the state's interest in appointing applicants in accordance with merit and fitness.[11]

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[11] The New York Court of Appeals distinguished its decision in *Mena v. D'Ambrose* from this case because in *Mena*, the petitioners had attacked the scoring of the qualifying examination, which had resulted in incorrect ranking of applicants on the eligible list, rather than, as in this case, the erroneous disqualification of applicants on medical or other grounds. Actually, the two cases are very similar.

In *Mena*, the qualifying examination contained questions that had alternative correct answers and several applicants complained that they would have scored higher on the examination and placed higher on the eligible list had they been credited with correct answers on those questions. Simply put, their complaint was that several individuals with lower scores had been promoted before they had. The challenge in *Mena* did not attack the scoring of the qualifying examination as a whole or require that everyone on the list be re-evaluated and re-ranked. The allegation in *Mena* was that the eligible list violated the merit and fitness standard because persons with higher scores were not properly ranked. The relief granted by the Court of Appeals in *Mena* required only correction of the ranking of the three petitioners in that case.

Similarly, in this case, the merit and fitness standard was violated because petitioner, who stood third on the list, was erroneously and illegally disqualified, and others less qualified were improperly ranked above him and therefore promoted before him. The fact that the merit

(continued...)

Finally, as in *Logan*, the distinction made by the court below between those applicants who will be afforded relief in the form of certification to a special eligible list and those denied that relief advances no state interests. The Court distinguished *Mena* from the case at bar because the petitioners in *Mena* had filed a judicial action before the list expired, while petitioner had successfully pursued an administrative appeal.

There simply is no rational distinction between disqualified applicants who have filed judicial proceedings before the eligible list expires and those who have filed (successful) administrative proceedings, particularly when state law *requires* administrative appeals of medical disqualifications to be completed before any judicial proceeding is commenced.[12] It was precisely this type of distinction that

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[11](...continued)
and fitness standard was violated by a different means is irrelevant. The state constitutional requirement that appointments be made in accordance with merit and fitness does not refer to the reason a person who scored lower on a civil service exam has been considered for a position ahead of an individual who was or should have been ranked higher. The sole concern of the constitutional provision is that a person who scored lower on the qualifying examination should not be given preference. Violation of the merit and fitness standard results in injury to the more qualified individual. That is the injury *Mena* remedied and that is the precise injury suffered by petitioner.

[12] The ability to file a judicial action before the expiration of an eligible list is, in large part, outside the control of the person challenging the disqualification. If the administrative procedure has not been completed prior to the list's expiration, there is no opportunity to file a judicial action. Moreover, if the administrative decision is favorable, as in petitioner's case, there is no need or standing to file such an action because no additional relief is necessary. This is particularly the case here, where petitioner could not have known that the eligible list was about to expire one and one-half years prematurely.

(continued...)

this Court rejected in *Logan v. Zimmerman Brush Company,* 455 U.S. 422 (1982). The New York Court of Appeal's limitation of appeal rights granted by state law to the duration of a list is no different from the decision of the Illinois Supreme Court to cut off the right to a hearing on a claim of discrimination because an agency had failed to act within a statutory time period.

The Court of Appeals' decision makes the right to relief -- certification to a special eligible list -- depend not upon the time that has passed since the competitive examination has been given, not upon any actions or failure to act by the applicant, and not upon whether the applicant has demonstrated that his appeal has merit during the administrative proceeding he must pursue before filing a case in court. Any one of these factors might advance the state's merit and fitness standard. Rather, relief for the aggrieved applicant will, in the future, depend solely upon chance and the good -- or ill -- will of respondents, who make the initial determination to disqualify applicants and then can hold the keys to the courthouse hostage until applicants' right to appeal expires along with the list they control. As this Court stated in *Logan*:

> A system or procedure that deprives persons of their claims in a random manner...necessarily presents an unjustifiably high risk that meritorious claims will be terminated.

Logan v. Zimmerman Brush Co., supra, 455 U.S. at 434-35.

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[12](...continued)

Under the Court of Appeals' decision an aggrieved individual, like petitioner, who prevails in an administrative proceeding, is in a worse position than one who is unsuccessful. The latter can immediately file a proceeding pursuant to Article 78 of the Civil Practice Law and Rules, while the former must await certification from the list and can lose the right to consideration if the agency delays certification until the list has expired.

The procedural limitation imposed by the court below on petitioner's state-created property rights operates in completely arbitrary manner.[13] In petitioner's case, it ensured that a meritorious claim was terminated. And, as in *Logan*,

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[13] As the dissenters in the Court of Appeals pointed out:

> [A]s in *Logan*, the classification resulting from today's decision -- according list-extending rights under *Mena* to some applicants but not to others depending upon the happening of an event over which the applicant has no control -- is entirely arbitrary and produces incongruous and patently unfair consequences (citations omitted). This can best be demonstrated by example.
>
> Three job applicants are erroneously disqualified and all file their administrative appeals on the same day. The first applicant's appeal is decided quickly. He "wins", is certified, and under *Mena* the statutory durational period of his eligibility begins to run from the date of correction. He is considered for existing vacancies. The second applicant's appeal is decided quickly. He "loses" and immediately commences a CPLR [Article] 78 proceeding which the courts resolve in his favor. Under *Mena*, he has his eligibility extended and is considered for existing vacancies. Their third applicant's appeal procedures are held up due to administrative delays. Eventually they terminate in his favor but not until the eligible list is about to expire. He is not certified immediately. Because he "won" he is not aggrieved and cannot commence a proceeding. Under the decision here, he is entitled to no *Mena* relief. The list is not extended. He cannot be considered for existing vacancies.
>
> The case of the third applicant is the case before us. That the first and second applicants should obtain *Mena* relief but not the third, comports with neither fairness nor common sense and the holding that this is the New York rule results in a violation of petitioner's federal and state due process rights. His substantial property interest in being considered for appointment based on merit and fitness and in being able to protect that interest through an effective use of the administrative appeal mechanism is cut off by implementation of a state procedural pre-condition which does not reasonably further any discernible governmental purpose.

App. A at 23a-24a (citations omitted).

deprivation of petitioner's right is final; there can be no relief from judicial review.

II.

The Ruling of the New York Court of Appeals Puts a Substantial Burden on the Assertion of Federally Created and Protected Rights

The New York Court of Appeals' decision to limit the property rights of persons aggrieved by the actions of state and city officials affects not only persons in petitioner's shoes. It affects virtually all civil rights claimants who have been denied public employment for discriminatory reasons and seek to pursue their federally created and protected rights in federal court.

If a person aggrieved by actions taken by respondents files a federal judicial action alleging a violation of Title VII of the Civil Rights Act of 1964 or of section 504 of the federal Rehabilitation Act of 1973,[14] and the eligible list to which that person should have been certified expires during the pendency of the action, the effect of the decision of the court below is to terminate that person's right to relief.

Plaintiffs in Title VII or Rehabilitation Act cases are often not challenging the scoring of the competitive examination. Moreover, such cases -- particularly if they are class actions -- frequently require time to resolve. If the eligible list expires before the federal court issues a judgment,[15] the

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[14] 42 U.S.C. § 2000e *et seq.*(1982 & Supp. IV 1986); 29 U.S.C. § 794 (1982 & Supp. V 1987).

[15] Indeed, the respondents have taken the extraordinary position that they will not implement a judgment issued by a state court in 1987 -- well before the claimant's eligible list expired -- because approximately a year after judgment and before the claimant was appointed, his list did expire. *See SanGiorgio v. Ward,* No. 113586 (N.Y. Sup. Ct., N.Y. Cty., Sept. 14, 1987) (Judgment and Order).

decision of the court below appears to rob such civil rights claimants of the most significant form of relief -- eligibility for the job.

Indeed, this issue has already arisen in a civil rights case pending in the Southern District of New York before Judge Robert P. Patterson, Jr. In *Burka v. New York City Transit Authority*, 85 Civ. 5751 (S.D.N.Y. filed July 26, 1985), the parties have come to a agreement to settle the claims of a portion of the class. The defendant has agreed to appoint or promote persons it previously rejected. However, respondents in *this* case -- the Department of Personnel -- have taken the position that since plaintiffs did not challenge the scoring of the qualifying examinations and the eligible lists of these class members expired, it will not certify anyone to an eligible list and will thereby prevent the awarding of relief to class members the defendant admits it wrongly rejected. Presumably, should Judge Patterson find for plaintiffs in the portion of the case tried before him this spring, respondents will similarly oppose his awarding class members the relief ordinarily accorded victorious plaintiffs in such civil rights cases.

If the decision of the court below is not reversed, many persons filing timely civil rights actions related to city or state employment will be deprived of their federally created property rights (*i.e.*, causes of action). The lower court has created a separate statute of limitations that will operate to cut off their right to relief. *See Felder v. Casey*, ___ U.S. ___, 108 S.Ct. 2302 (1988).

CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: August 2, 1989

APPENDIX

APPENDIX A

Opinion of the New York State Court of Appeals Decided May 4, 1989

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 70
In the Matter of Melvin Deas,
Respondent,
v.

OPINION*

Judith Levitt, as the Director of the New York City Department of Personnel, et al.,

Appellants.

Peter L. Zimroth, NY City Corporation Counsel (Dana M. Robbins, Francis F. Caputo, Larry A. Sonnenshein of counsel) for appellants.

Ellen M. Weber & Margaret K. Brooks, NY City, for respondent.

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* This opinion is uncorrected and subject to revision before publication in the New York Reports.

SIMONS, J.

Petitioner, seeking a promotion in the competitive classification of the Civil Service, took the required examination and achieved the third highest score. His certification was delayed, however, because he was found to be medically unqualified. After administrative proceedings, the disqualification was reversed but the eligible list on which his name appeared expired before the Department of Personnel certified him. He instituted this proceeding to compel establishment of a special eligibility list, claiming that this is the appropriate remedy under our decision in *Matter of Mena v. D'Ambrose* (44 NY2d 428) and that it is warranted by the due process clauses of the State and Federal Constitutions.

There should be a reversal. Before being entitled to placement on a special eligible list for a civil service position, an applicant must bring a proceeding, before the list expires, successfully challenging the validity of the list itself. Because petitioner does not challenge the validity of the eligible list as being contrary to the merit and fitness requirements of the State Constitution (Art V, § 6), he has no right to the relief requested. This conclusion does not violate due process of law under either the Federal or State Constitutions; nor is distinguishing between applicants who attack the constitutional validity of the list and those that allege only that they were otherwise eligible arbitrary and capricious. Accordingly, the order of the Appellate Division should be reversed and the judgment of Supreme Court dismissing the petition should be reinstated.

I

Petitioner Melvin Deas is employed as a bus maintainer helper "B" by the New York City Transit Authority. In October 1983, he applied for promotion to the position of Bus Maintainer "A". Petitioner passed the required civil service examination and ranked third on the eligible list established in March 1984. In August of that year a position became available and he was asked to report for a medical examination. Following a psychiatric evaluation, the Transit Authority disqualified petitioner from employment on medical grounds. He appealed the disqualification to the New York City Department of Personnel which held a hearing and conducted a second psychiatric examination. In March 1985, the New York City Director of Personnel disqualified petitioner for medical reasons based on the psychiatrists' reports. Petitioner then took his final administrative appeal to the New York City Civil Service Commission and requested a hearing. On August 14, 1986, the Civil Service Commission reversed the Department of Personnel's decision and concluded that petitioner was medically eligible for the promotion. On September 5, 1986, the Department of Personnel notified petitioner that it could not certify him for the position because the eligible list had expired on August 27, 1986 upon the formation of a new list based upon a competitive examination held in July. Petitioner had not taken the July examination, thus his name was not on the new eligible list, and he requested that his name be placed on a special eligible list. His request was denied and he initiated this article 78 proceeding, contending that the refusal to certify him for the Bus Maintainer "A" position was arbitrary and capricious and violated his right to due process of law under the State and Federal Constitutions.

Supreme Court dismissed the petition but the Appellate Division reversed and granted the petition, directing peti-

tioner's name be placed on a special eligible list. Two justices concluded that petitioner's case was distinguishable from our decision in *Matter of Tanzosh v New York City Civil Serv. Commn.* (44 NY2d 906) because in this case, unlike *Tanzosh*, the eligible list did not expire until after the administrative appeals process had been completed and the Civil Service Commission had determined that petitioner was medically eligible. They also held, relying on *Logan v Zimmerman Brush Co.* (455 US 422), that denying petitioner certification would constitute a violation of his Federal due process rights. Justice Wallach concurred in result, concluding that *Tanzosh* could not be distinguished from the case at bar, but that strict application of the *Tanzosh* rule results in an unconstitutional deprivation of the opportunity to be heard and a violation of equal protection of the law. Justices Sandler and Sullivan dissented and voted to affirm. The Department of Personnel has appealed as of right (*see*, CPLR 5601[a]).

II

Article V, § 6 of the New York State Constitution provides in pertinent part, "Appointments and promotions of the Civil Service of the state and of all civil divisions thereof *** shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." Pursuant to this provision, periodic examinations are given to candidates for appointment and promotion in the civil service and, after the results of an examination are calculated, an eligible list is established which places the successful candidates in order of their grades. The list continues for not less than one nor more than four years. An eligible list that has been in existence for one year or more terminates upon the establishment of a new list "unless otherwise prescribed by the state civil service department of municipal commission

having jurisdiction" (Civil Service Law § 56). Appointments must be made from names appearing on the list but the appointing authority is free, in its discretion, to select any one of the top three candidates.

For many years we interpreted these provisions to mean that a civil service applicant could not be appointed from an expired list. In the words of former Chief Judge Loughran, it is "a legal impossibility" (*Matter of Cash v Bates*, 301 NY 258, 261; *see also, Matter of Carow v Board of Education of the City of New York*, 272 NY 341, 345-346; *Ciaccia v Board of Education of the City of New York*, 271 NY 336, 339; *Hurley v Board of Education of the City of New York*, 270 NY 275, 280). In *Hurley*, the seminal case on the subject, the Legislature passed a law which sought to revive an expired list. The plaintiff argued that the statute did not disregard the merit and fitness requirement of the State Constitution since it permitted appointments only from an eligible list previously prepared after a competitive examination. We rejected her argument, stating: "Competitive examination, so far as practicable, is the *sole* test of merit and fitness permitted by the Constitution. Preference among those qualified for a position must be determined solely by relative standing on the eligible list then in force. Favor must excluded. It is not excluded when without a new examination the Legislature commands that appointments must be made from an eligible list not in force ***. *** A competitive examination may demonstrate merit and fitness, at the time of the examination. As time passes, its value as a test of merit and fitness diminishes. Others may, then, be better prepared and more fit to fill a position that those who are upon the list" (*id.* at 280 [emphasis in original]).

In 1978, we rendered three decisions which, it appears from the several opinions of the Appellate Division, have generated confusion in this area. In the first case, *Matter of*

Mena v D'Ambrose (44 NY2d 428), we established a narrow exception to our previous rule, holding that when an applicant demonstrates in a judicial action instituted prior to the expiration of the eligible list that it is based on an erroneously scored test, the statutory life of the list does not begin until the list is corrected. Thus, we directed that petitioner, having successfully challenged the legality of the list, be placed on a special eligible list. In *Matter of New York City Department of Personnel v New York State Division of Human Rights* (44 NY2d 904), we held that an applicant, who was wrongly passed over for appointment because of her age, could not be placed on a special eligible list because she did not file her administrative complaint until after the eligible list had expired. Finally, in the third decision, *Matter of Tanzosh v New York City Civil Service Commn.* (44 NY2d 906), a case indistinguishable from the matter under consideration, the applicant was initially found medically unfit for the position of patrolman, but it was determined in an administrative proceeding, concluded seven months after the expiration of the list, that he was medically eligible for certification. Tanzosh's claim that he should be placed on a special eligible list was denied.

All five Appellate Division justices read these decisions to mean that petitioner's entitlement to relief depended upon whether a judicial, as opposed to an administrative, proceeding had been commenced prior to the expiration of the eligible list. Although the commencement of a proceeding before the list expired was necessary, the controlling issue was not the nature of the proceeding, but the nature of the claim. Thus, *Mena* is different from *Tanzosh* not only because Mena commenced a judicial action prior to the expiration of the list, but also because Mena challenged the validity of the list itself, asserting that the constitutional merit and fitness requirements had been violated and unqualified individuals were obtaining civil service employment. As

these decisions make clear, it is not sufficient to attack either the validity of the eligible list (*see, Matter of Cash v Bates*, 301 NY 258, *supra*) or commence a proceeding before the list has expired (*see, Matter of Tanzosh v New York City Civil Service Commn., supra*). Relief may not be granted unless the applicant does both.

Unlike the petitioner in *Matter of Mena*, petitioner has not alleged that the eligible list is constitutionally invalid, only that he was wrongfully denied certification. Thus, under the rule applied in *Matter of Tanzosh*, he is not entitled to be placed on a special eligible list. Unless application of our rules violates Federal due process, appointment of petitioner is impossible because appointment of an individual from a constitutionally valid expired list violates Article V, section 6 of the New York State Constitution (*Ciaccia v Board of Education of the City of New York*, 271 NY 336, 339; *Hurley v Board of Education of the City of New York*, 270 NY 275, 280).

III

Analysis of petitioner's due process claim begins with the identification of the particular property interest affected, if any, and once identified, the determination of what process is due him (*Mathews v Eldridge*, 424 US 319; *Goldberg v Kelly*, 397 US 254). The Constitution does not create property interests (*Bishop v Wood*, 426 US 341, 344; *Perry v Sindermann*, 408 US 593, 599–603; *Economico v Village of Pelham*, 50 NY2d 120, 127). Rather, "they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" (*Board of Regents v Roth*, 408 US 564, 577; *see also, Martinez v California*, 444

US 277, 282, n5; *Russo v New York State Bd. of Parole*, 50 NY2d 69, 73–74).

As petitioner concedes, successful completion of a civil service examination does not create a property interest in appointment to the position for which he has applied (*see, Cassidy v Municipal Civil Serv. Commn.*, 37 NY2d 526, 529–530; *Hurley v Board of Education of the City of New York*, 270 NY 275, 279). Nor does the fact that the statutes grant applicants the right to appeal adverse decisions create any property right. Petitioner's claim is that having successfully completed the examination he is entitled to be considered for promotion. He relies on *Drogan v Ward* (675 F Supp 832) in which the Federal District Court for the Southern District of New York held that Civil Service Law § 61 and § 3.6 of the Rules and Regulations of the Department of Civil Service served to provide an applicant who has successfully passed an examination with a "claim of entitlement" to be considered for promotion or appointment (*see also, Griffin v Carey*, 547 F Supp 449, 453).

The *Drogan* holding is contrary to New York law. In *Cassidy v Municipal Civil Serv. Commn.* (37 NY2d 526, *supra*), we considered what right, if any, applicants possess after successfully passing a civil service examination, and concluded that they do "not possess any mandated right to employment *or any other legally protectible interest*. [They] can assert at most the right to consideration for and a 'hope' of appointment" (*id.* at 529 [emphasis added]). As the Supreme Court noted in a similar situation, petitioner may have had an "unilateral expectation" that he would be considered for a position, but he had no claim of entitlement (*Board of Regents v Roth, supra*, at 577; for illustrative purposes *compare Bishop v Wood, supra, with Arnett v. Kennedy*, 413 US 134 and *Board of Regents v Roth, supra, with Perry v Sindermann, supra*). Since petitioner had no

property interest to be considered for appointment, the inability of the Department of Personnel to certify him as eligible after expiration of the list upon which his name appeared did not deny him due process of law.

Even if petitioner's argument is accepted, however, it does not entitle him to be placed on a special eligible list. Whatever property interest he might have had to be considered for employment was limited by the life of the eligible list on which his name appeared and the list expired before this action was commenced.[1]

Petitioner also relies on the United States Supreme Court's decision in *Logan v Zimmerman Brush Co.* (455 US 422, *supra*) to support his due process claim. In *Logan*, an individual's employment discrimination claim was inadvertently terminated because the State, although obligated by statute to do so, did not arrange for a fact-finding conference between the claimant and the employer within 120 days after his administrative complaint was filed. Its failure effectively terminated the claim. The Supreme Court

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[1] We note there are no allegations that petitioner's rights were impaired by bad faith or arbitrary action by the Department of Personnel during the appeals process.

We also observe that, contrary to petitioner's claim, the City Department of Personnel was not obligated to provide petitioner with personal notice that the list on which his name appeared would soon expire. Petitioner was on notice pursuant to Civil Service Law § 56 that an eligible list may be superseded by a new list at any time after the passage of 1 year. Moreover, petitioner was placed on notice that a new civil service examination was being held while he was appealing his disqualification for medical reasons. Nothing prevented him from taking this examination and thereby attempting to qualify for the new eligible list.

concluded that the right of a claimant to use the adjudicatory procedure contained in the Illinois Fair Employment Practices Act was a species of property right protected by the due process clause, and that the State's failure to consider the merits of Logan's charge before deciding to terminate his claim denied him due process. In a separate opinion, Justice Blackmun, joined by three other members of the Court, concluded that the 120 day limitation denied claimant equal protection of the law because there was no rational basis for distinguishing between claims processed within 120 days and otherwise identical claims not receiving a hearing within that time.

Petitioner's attempt to bring his case within *Logan*[2] fails for several reasons. First, unlike the property interest at stake in *Logan*, the requirement that a civil service applicant demonstrate eligibility prior to the expiration of the eligible list is not a procedural limitation on the ability of the applicant to assert his or her rights; it is "merely one aspect of the State's definition of that property interest" (*Martinez v California*, 444 US 227, 282, n5). The State, having created the property interest may also define its dimensions. Here petitioner's asserted property interest was of no greater duration than the life of the eligible list. The distinction is between defining the substantive nature of the right created, which is within the Legislature's power, and determining what process is due to protect the right once it has been defined

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[2] Although petitioner does not make an equal protection claim as such, the second part of his due process argument, based on his reading of *Mena* and *Tanzosh* that the State has acted arbitrarily and without a rational basis in distinguishing between applicants that commence judicial proceedings prior to the expiration of the list and those that only file administrative proceedings, is not substantively different from the arguments made in the concurring opinion in *Logan*.

(*compare Martinez v California, supra*, with *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306). Even if one characterizes our rules limiting consideration for appointment to the life of the list as a statutory deprivation, however, "it would remain true that the State's interest in fashioning its own rules *** is paramount to any discernible federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary and irrational" (*Martinez v California, supra,* at 282). Far from being arbitrary or irrational, the rule which requires that civil service positions be made from a current rather than expired list is constitutionally mandated. Thus, unlike the situation in *Logan* where neither of the State's two express purposes for enacting the FEPA -- "eliminating employment discrimination and protecting employers and other potential defendants from unfounded charges of discrimination" -- were advanced by the 120-day deadline provision (*Logan, supra*, at 439), the rule that civil service applicants be appointed from the most recent list promotes New York's constitutional directive.

Nor is there any constitutional prohibition against distinguishing between applicants who have attacked the validity of the list prior to its expiration as being in derogation of the constitutional merit and fitness requirements (*e.g., Mena v D'Ambrose*, 44 NY2d 428, *supra*) and those who have only alleged they have been wrongly ruled ineligible for medical or similar reasons (*e.g., Matter of Tanzosh v New York City Civ. Serv. Commn.*, 44 NY2d 906, *supra*). The integrity of the Civil Service system is placed in issue only where the applicant successfully attacks the validity of the list. When that has been done, we have extended the corrected list, because the original was never valid; a special list was created, to continue for a period of one to four years pursuant to section 56. Manifestly, that remedy was not

required as a matter of due process, but because of State requirements that appointments be based on merit.

Finally, there is no significance to the fact that in this case petitioner demonstrated eligibility 12 days prior to the expiration of the eligible list rather than after its expiration, as in *Tanzosh*. The Department was not required to certify him immediately upon learning of the administrative determination. It had four months, pursuant to article 78 of the CPLR, to consider whether to appeal the Civil Service Commission's decision and not until the expiration of this 4-month period did a proceeding in the nature of mandamus to compel properly lie. Moreover, as noted by Justice Sullivan below, petitioner's loss of the appointment was not necessarily caused by the Department of Personnel's failure to certify him. Assuming that the Department did certify petitioner on the day the Civil Service Commission rendered its decision, it was not required to appoint him during the 12-day interval between the date of decision and the expiration of the list (*see Cassidy v Municipal Civil Serv. Comn.* (37 NY2d 526, *supra*).

Accordingly, the order of the Appellate Division should be reversed and the judgment of Supreme Court dismissing the petition reinstated without costs.

Matter of Deas v. Levitt
No. 70

BELLACOSA, J. (concurring):

I concur to reverse solely on constraint of *Tanzosh v NYC Civil Service Comm.* (44 NY2d 906). The remedy available under that case should be expanded to aggrieved persons invoking administrative as well as judicial fora for relief,

especially in view of the peculiar procedural immobilization of and inequity to this petitioner. I would have considered overruling the arbitrary limitation of *Tanzosh* (*supra*), but am constrained in this instance against doing so (*see*, *Mtr. of Simpson v Loehmann*, 21 NY2d 305, at 314–315 [concurring opn, Brietel, J.]).

Matter of Deas v. Levitt
No. 70

HANCOCK, JR., J. (dissenting)

Petitioner was erroneously disqualified by the New York City Department of Personnel as psychologically unfit and removed from his standing near the top of the eligible list for a civil service promotion. After two years, during which he diligently pursued the available administrative remedies, the mistaken disqualification was rectified. Despite his ultimate success in the administrative proceedings, he was not considered for appointment to existing vacancies. When petitioner finally received the favorable determination, the Department failed to certify him and extend his eligibility. Instead, the list on which his name appeared was replaced and thereby the list was automatically terminated. In short, although petitioner "won", he gained nothing.

Under these circumstances is petitioner entitled to legal relief? By any standard of fairness and common sense he should be. Under what I believe is the governing New York rule (*Matter of Mena v D'Ambrose*, 44 NY2d 428) he should be. Indeed, the Appellate Division plurality, following the rule we established in *Mena*, held that petitioner's rights should be preserved by placing his name on a special extended eligible list.

The majority of this court now holds, however, that petitioner is without a remedy.[1] In doing so, the plurality makes a highly restrictive interpretation of the principle in *Mena* and relies on factual distinctions that bear no relation to the civil service objectives and governmental interests which purportedly justify such distinctions (*see generally*, *Baer v Town of Brookhaven*, __ NY2d __ [March 23, 1989]; *McMinn v Town of Oyster Bay*, 66 NY2d 544, 549; *French Investing Co. v City of New York*, 39 NY2d 587, 596). As a result, petitioner has, in my view, been deprived of a property interest under state law -- i.e., the right to be fairly considered for promotion solely on his merit and fitness and the complementary right to preserve that interest by making effective use of the review and appeal process guaranteed him by state law (*see*, NY Const art V § 6; NYC Charter § 812(c); *Matter of Mena v D'Ambrose*, *supra*; *see also*, *Matter of Pan Amer. World Airways v New York State Human Rights Appeal Bd.*, 61 NY2d 542, 547-548; *Matter of Economico v Village of Pelham*, 50 NY2d 120, 127). For reasons which follow, I agree with the Appellate Division plurality and concurrer and with the amicus, New York City Civil Service Commission, that failure to afford petitioner his remedy under *Mena* violates his state and federal due process rights (*see*, NY Const, art I § 6, US Const 14th Amend). Accordingly, I dissent.

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[1] I agree with the view expressed by the concurrer that our precedents, at least as he and the plurality read them, result in a "peculiar procedural immobilization of and inequity to this petitioner". Indeed, it is just this unfair, arbitrary, and unequal result of applying what the concurrer and the plurality accept as the New York rule which gives rise to petitioner's claim that there is a due process violation (*see*, *infra*, at [19a-24a]).

I

Petitioner took the civil service competitive examination for the position of Bus Maintainer "A" and was ranked third out of thirty-seven on the eligible list published in March 1984. When a position became available in August 1984 petitioner was asked to take a physical and psychiatric exam (*see*, Civil Service Law § 50[4]). Based on the results of that examination he was disqualified as psychologically unfit. He filed an appeal to respondent New York City Department of Personnel. The Personnel Department, after taking no action for five months, eventually (in April 1985) upheld his disqualification. Although he immediately filed an appeal to the Civil Service Commission, the Department failed to file its reply report until September 1985 and the Commission did not hold a hearing until July 1986. Finally, on August 14, 1986 the Commission reversed, holding that petitioner had been erroneously disqualified by the Department.

At the time of the Commission's decision, there were apparently four vacant positions, the eligible list was still in existence, and all of the other candidates on the list had been interviewed and either appointed or rejected. Nonetheless, the Department failed to certify petitioner so that he could be considered for one of the vacancies. Instead, with no notice to petitioner, it established a new eligible list on August 26, 1986 and thereby automatically terminated the list that had petitioner's name on it (*see*, Civil Service Law § 56). When advised of this in September 1986, petitioner requested that he be placed on a special eligible list pursuant to *Matter of Mena* (*supra*) and *State Division of Human rights v County of Onondaga* (84 AD2d 931). Upon respondent's denial of this request, he commenced the instant CPLR art 78 proceeding.

II

In *Mena* a scoring error resulted in a candidate being wrongfully considered for a position although the other candidates, the petitioners, had actually achieved higher test scores. We concluded that this erroneous action violated the constitutional merit and fitness requirement because petitioners had, by the tests, demonstrated greater ability than the candidate who was interviewed and appointed. We held that since petitioners had brought a timely challenge to such action, they were entitled to be placed on a special extended eligible list (44 NY2d, *supra*, at 432–433). The plurality, however, distinguishes *Mena* on two grounds: (1) that *Mena* involved a challenge to the eligibility list and (2) that in *Mena* judicial action was commenced before the expiration of the list. I believe that neither ground is valid.

At the root of the plurality's reading of *Mena* as requiring that the challenged error must relate to the eligibility list itself is its position that *only such an error* implicates the state constitutional merit and fitness clause (*see*, Plurality Slip Opn, pp 2, 7, 12). This is not so.[2] The use of competitive examinations and the ranking of test takers by their scores is but one part of the legislative scheme designed to satisfy "the overarching constitutional goal and command" of merit selection (*McGowan v Burstein*, 71 NY2d 729, 734, *see*, NY Const, art V § 6). The use of the statutory grounds for disqualification (Civil Service Law § 50[4]) is another necessary part of the process of merit selection (*see also*,

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[2] Petitioner has raised a claim that respondent acted in contravention of the merit and fitness clause. His petition states "respondents acted * * * contrary to the State constitutional mandate that promotions in the civil service of the city shall be made on the basis of merit and fitness, New York State ~~Constit~~ution, Art. 5, Section 6."

Cassidy v Municipal Civ Serv Commn, 37 NY2d 526, 528–529). That the error here was in medical diagnosis instead of scoring is irrelevant; both types of errors mischaracterize the applicant's qualifications and cause someone with less standing to be considered in violation of the constitution. Indeed, in *Matter of Tanzosh v New York City Civil Serv Commn* (44 NY2d 906) -- a case also involving an allegedly erroneous physical–psychological disqualification under Civil Service Law § 50(4) (b) -- this court did not make the distinction now being made by the plurality, that only an error in the eligible list itself implicates the right recognized in *Mena*.

Nor does the fact that petitioner here, unlike the petitioners in *Mena*, failed to commence his CPLR art 78 proceeding until after the list expired, constitute a reason for not according petitioner the same relief given in *Mena*. There are two reasons why this is so:

(1) The legal principle for our decision in *Mena* reflects both a principle of fairness to the applicant and the state's interest in the integrity of the merit and fitness selection system: where there is an error in derogation of the merit and fitness standards, the durational limitation provision of Civil Service § 56 is "not intended to exonerate known and continued wrongs of the offending testing agency by the mere passage of time" (44 NY2d at 433). The efficacy of this rule in no way depends upon commencement of a CPLR art 78 proceeding or whether it was started before or after the expiration of the list. Thus, the principles underlying *Mena* are fully applicable here. As in *Mena*, petitioner timely challenged his erroneous disqualification. The belated recognition of error came only after procedures lasting two years, including approximately 17 months of administrative delay in filing papers and scheduling hearings and examinations. When the error was finally corrected the

Department failed to certify petitioner so that he could be considered for the available vacancies. As in *Mena*, it would be both unfair to petitioner and contrary to the civil service concept of merit selection to use this period of bureaucratic delay to exonerate the Department and to deny petitioner relief (*see*, 44 NY2d at 432–433).

(2) In any event, unlike the petitioners in *Mena*, petitioner was not aggrieved until *after* the list expired. Thus, he had no basis for commencing a CPLR art 78 proceeding. In *Mena*, the petitioners were expressly informed prior to the expiration of the list that despite the agency's error their eligibility could not be extended because existing state law did not then permit it. Here, by contrast, petitioner was not informed that his rights would not be honored until after the list expired. Thus, he had every reason to believe that since he had demonstrated the Department's error, he would receive the relief that had been established in *Mena* -- i.e., that "the statutory durational period [would] not begin to run until the [error was] corrected" (*id.*, at 433).

In sum, in *Mena* we recognized a right that by its very nature is self–executing: where it is demonstrated prior to the expiration of the eligible list that there were errors in violation of the constitutional merit and fitness requirements, the statutory durational period does not begin to run until the errors are corrected (*see*, 44 NY2d at 433, *supra*; *see also*, *State Division of Human Rights v County of Onondaga*, 84 AD2d 931, *supra*).[3] Applying this rule here, I believe, entitles

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[3] *Matter of Tanzosh v New York City Civil Serv. Commn* (*supra*) is not to the contrary. In that case, petitioner failed to demonstrate the existence of any error prior to the expiration of the eligible list. Thus, he was not entitled to rely on the self–executing right to extend an existing list.

(continued...)

petitioner to relief. Because he demonstrated that he was wrongfully disqualified from consideration for the promotion, his eligibility could not expire until the error was corrected. The court holds, nonetheless, that this case is distinguishable and, as a result, petitioner is left without recourse under state law. It becomes necessary, therefore, to address his second contention -- adopted by the Appellate Division plurality and concurrer and endorsed by the City Civil Service Commission -- that the failure to grant *Mena* relief violates petitioner's state and federal due process rights (NY Const, art I § 6, US Const 14th Amend). I believe it does.

III

Preliminarily, it should be evident that petitioner's due process argument does not depend on a claimed state law right to *appointment*. Rather, his property interest stems from his expectancy under state law of being *fairly considered* for a position based upon his relative merit and fitness. The distinction is critical because the cases relied on by the plurality (*Cassidy v Municipal Civil Serv Commn*, 37 NY2d 526; *Board of Regents v Roth*, 408 US 564) involve claimed property rights to *appointment*. An applicant, such as petitioner, who ranks in the top three for a particular position *must be considered*, as a matter of statutory right, unless there

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[3](...continued)
Rather, he required the revival of an expired list. It is unnecessary to decide whether due process would require that an applicant in such circumstances is entitled to relief. No such claim was raised in *Tanzosh*.

is some valid ground for finding the applicant unfit (*see*, Civil Service Law §§ 50[4]; 61).[4]

Petitioner's state property interest includes the right to be fairly considered solely on the basis of his relative qualifications. It also includes the concomitant right not to be excluded from consideration for a merited appointment by being mistakenly disqualified. It is to assure this protection that the State has devised the appeal procedures which petitioner used here (*see e.g.*, NYC Charter §§ 812[c], 813[a][3]-[8]; [b][5]). We have held that this statutory scheme embraces the right to placement on a special eligible list if the employing agency caused an error in violation of the state constitutional merit and fitness clause and a timely challenge is brought (*see*, *Matter of Mena v. D'Ambrose*, *supra*). Because, as demonstrated *supra* (pp 4-5), there is no basis for substantively distinguishing *Mena*, the *sole* remaining ground for denying petitioner *Mena* relief is that he did not commence a CPLR art 78 proceeding prior to the expiration of the eligible list. I believe that reliance on this factor for nullifying petitioner's property interest -- like the determining procedural requirement in *Logan v Zimmerman Brush Co.* (455 US 422), that a hearing be held within 120 days -- violates his due process rights.

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[4] In *Cassidy* we stated that "Petitioner does not possess any mandated right to appointment or any other legally protectible interest. He can assert at most the right to consideration for and a "'hope' of appointment" (37 NY2d at 529, *supra*). The plurality underscores the phrase "or any other legally protectible interest" apparently to demonstrate that we held there is no right to be considered for appointment. In *Cassidy* the plaintiff, however, *had been considered*. His only claim was to appointment. Thus, we could not and did not hold that there is no property right to consideration.

In *Logan* the Illinois Fair Employment Practices Act required that a hearing be conducted by a state agency within 120 days after the filing of an employment discrimination claim and that a failure to comply with this condition would result in final dismissal of the complaint (455 US at 426–428). The Supreme Court held that the state had created a property interest in using the FEPA administrative adjudicatory procedures to redress grievances (*id.*, at 431). It specifically rejected the state's argument that the 120–day time limitation was merely an aspect of the definition of the property right and decided instead that it was a procedural limitation on the claimant's ability to assert his rights (*id.*, at 433).

In concluding that this procedural limitation violated petitioner's due process rights the *Logan* court stressed three factors:

(1) that the dismissal of the claim was not due to any fault of claimant but solely to the government's failure to act prior to the deadline;

(2) that claimant had a substantial interest in keeping his job and disproving his employer's erroneous charges of incompetence or inability; and

(3) that no substantial governmental interest was furthered by adherence to the procedural rule which resulted in the defeat of claimant's property interest.

I believe that *Logan* controls this case. Here, petitioner had a state created property interest in being fairly considered for a civil service position and in being able to make effective use of the available administrative processes to correct governmental errors which might defeat that interest. Like the 120–day limitation in *Logan*, the pre–condition upon which

the majority of this court makes *Mena* relief depend -- that a judicial proceeding be started before the list expires -- is a final deprivation of petitioner's state property interest.

Moreover, as in *Logan*:

(1) That the limiting pre-condition was not met was to the result of any failure on petitioner's part. Rather, it was due to governmental delay in the appeal process and the failure to certify petitioner for available positions.[5]

(2) Petitioner had a substantial interest in being considered for a promotion and in erasing the erroneous determination of psychological unfitness.

(3) No substantial state interest is furthered by giving effect to the prior judicial proceeding pre-condition. The plurality's sole attempt to demonstrate a state concern in adherence to this procedural requirement for *Mena* relief -- that the state has an important interest in civil service applicants being appointed from a current list (*see*, Plurality Slip Opn, p 12) -- seems particularly unconvincing in the light of this court's holding in *Mena*. In *Mena*, of course, the identical consideration existed. The government asserted an interest in appointing only from the current list and in not allowing an applicant's eligibility to be extended beyond the life of the list. The *Mena* court specifically rejected this claimed governmental interest and extended the petitioners' eligibility stating, "Although there does exist a strong policy that appointments be made from contemporary lists, this

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[5] This case is even more compelling than *Logan*. In *Logan*, the time ran before it could be determined whether there was a meritorious claim. Here, *it was already decided that petitioner was wronged* when the list expired. The majority uses this time limit to deny relief *to a proven wrong*.

policy must be secondary to the constitutional mandate governing appointment [i.e., merit and fitness] which is implemented by the Civil Service Law standards" (44 NY2d at 433, *supra*).

(4) Finally, as in *Logan*, the classification resulting from today's decision -- according list-extending rights under *Mena* to some applicants but not to others depending upon the happening of an event over which the applicant has no control -- is entirely arbitrary and produces incongruous and patently unfair consequences (*see also*, *Baer v Town of Brookhaven*, *supra*; *McMinn v Town of Oyster Bay*, 66 NY2d 544, 549, *supra*; *French Investing Co.*, 39 NY2d 587, 596 [there must be reasonable relationship between the legitimate government interest sought to be achieved and the means used]). This can best be demonstrated by an example:

Three job applicants are erroneously disqualified and all file their administrative appeals on the same day. The first applicant's appeal is decided quickly. He "wins", is certified, and under *Mena* the statutory durational period of his eligibility begins to run from the date of correction. He is considered for existing vacancies. The second applicant's appeal is decided quickly. He "loses" and immediately commences a CPLR art 78 proceeding which the courts resolve in his favor. Under *Mena*, he has his eligibility extended and is considered for existing vacancies. The third applicant's appeal procedures are held up due to administrative delays. Eventually they terminate in his favor but not until the eligible list is about to expire. He is not certified immediately. Because he "won" he is not aggrieved and cannot commence a proceeding. Under the decision here, he is entitled to no *Mena* relief. The list is not extended. He cannot be considered for existing vacancies.

The case of the third applicant is the case before us. That the first and the second applicants should obtain *Mena* relief but not the third, comports with neither fairness nor common sense and the holding that this is the New York rule results in a violation of petitioner's federal and state due process rights. His substantial property interest in being considered for appointment based on merit and fitness and in being able to protect that interest through an effective use of the administrative appeal mechanism is cut off by implementation of a state procedural pre-condition which does not reasonably further any discernible governmental purpose (*see*, NY Const, art I § 6; US Const 14th Amend; *Logan v Zimmerman Brush Co.*, *supra*; *see also*, *Bear v Town of Brookhaven*, *supra*; *McMinn v. Town of Oyster Bay*, *supra*, at 549; *French Investing Co. v City of New York*, *supra*, at 596).

The order should be affirmed.

* * * * * * * * * * *

Order reversed, without costs, and judgment of Supreme Court, New York County reinstated. Opinion by Judge Simons in which Chief Judge Wachtler and Judge Alexander concur. Judge Bellacosa concurs in result in a memorandum. Judge Hancock dissents and votes to affirm in an opinion in which Judge Titone concurs. Judge Kaye took no part.

Decided May 4, 1989

APPENDIX B

Order and Judgment (Remittitur)
of the
New York State Court of Appeals

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler,
Chief Judge, Presiding

1 No. 70
In the Matter of Melvin Deas,

Respondent,

v.

Judith Levitt, as the Director
of the New York City Department
of Personnel, et al.,

Appellants.

The appellant(s) in the above entitled appeal appeared by Hon. Peter L. Zimroth, Corporation Counsel of the City of New York; *the respondent appeared by* Margaret K. Brooks, Esq.; and amicus curiae appeared by Mark D. Lebow, Esq.

The Court, after due deliberation, orders and adjudges that the order is reversed, without costs, and judgment of Supreme Court, New York County, reinstated. Opinion by Judge Simons in which Chief Judge Wachtler and Judge Alexander concur. Judge Bellacosa concurs in result in a memorandum. Judge Hancock dissents and votes to affirm in an opinion in which Judge Titone concurs. Judge Kaye took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/
Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 4, 1989

COUNTY CLERK, NEW YORK COUNTY
CLERKS' MINUTES OF SUPREME COURT
ACTIONS AND PROCEEDINGS 1987

INDEX NO. 1701

Melvin Deas,

Plaintiff

AGAINST

Judith Levitt, City Personnel Director,

Defendant

Month	Day	Year	
*	*	*	
5	10	89	Remitt.

APPENDIX C

Opinion of the New York State Supreme Court, Appellate Division Dated June 28, 1988

SUPREME COURT, APPELLATE DIVISION
First Department, October 1987

Leonard H. Sandler, J.P.
Joseph P. Sullivan
E. Leo Milonas
Betty Weinberg Ellerin
Richard W. Wallach, JJ.

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In the Matter of the application of
Melvin Deas,

Petitioner-Appellant,

For a judgment pursuant to Article 78
of the CPLR

-against- 31031

Judith Levitt, as the Director of the New
York City Department of Personnel, and New
York City Department of Personnel,

Respondents-Respondents

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Appeal by the petitioner-appellant from an order of the Supreme Court, New York County (Kenneth L. Shorter, J.), entered on May 13, 1987 which denied petitioner's application pursuant to Article 78 seeking placement on a special eligible civil service list.

Ellen M. Weber, of counsel (Margaret K. Brooks with her on the brief; Legal Action Center of the City of New York, Inc. as attorneys) for petitioner-appellant

Dana Martine Robbins, of counsel (Larry A. Sonnenshein with her on the brief; Peter L. Zimroth, attorney), for the respondents-respondents.

MILONAS, J.

Petitioner-appellant Melvin Deas instituted this proceeding pursuant to Article 78 of the CPLR in order to challenge the refusal by defendants, Director of the New York City Department of Personnel and the Department of Personnel, to certify him for the position of Bus Maintainer "A". It is petitioner's contention that defendants' action deprived him of his right to due process under both the Constitutions of the State of New York and the United States and was also arbitrary, capricious and contrary to law. In that connection, a review of the record of the instant matter indicates that there is merit to petitioner's claim that he was the victim of an improper enforcement of a statutory time limitation.

Petitioner has been employed by the New York City Transit Authority for over twenty-three years, serving first as a car cleaner and later being promoted to the position of Bus Maintainer Helper "B". He was also licensed to operate a bus

after successfully completing the Transit Authority's training program. In October of 1983, petitioner applied for promotion to Bus Maintainer "A". A Bus Maintainer "A" is responsible for maintaining, inspecting and repairing the bodies and structural equipment on buses and, like a Bus Maintainer Helper "B", operates buses within the depot. Petitioner passed the required civil service examination and was ranked third on the eligible list, established March 21, 1984. In August of 1984, when a position became available, he was asked to report for a medical examination, a prerequisite to appointment. As part of that examination, he was interviewed by a psychiatrist, who concluded that petitioner was not medically qualified for the job because of a history of schizophrenia and drug abuse. It is significant that although petitioner had been treated for a psychological problem in 1971, the psychiatrist conceded that petitioner exhibited none of the symptoms of the disease suffered by him thirteen years earlier. Yet, acting upon the recommendation of its psychiatric consultant, the Transit Authority disqualified petitioner from the appointment.

Petitioner thereafter appealed his medical disqualification to the New York City Department of Personnel, which took no action in connection with the matter for some five months. Finally, in March of 1985, a second psychiatric examination was conducted, and the same finding was made -- petitioner should be disqualified for the position of Bus Maintainer "A" because there was a risk that his psychopathology would recur. The Director of Personnel then disqualified petitioner, who promptly appealed the determination to the New York City Civil Service Commission. In September of 1985, five months after petitioner had filed his appeal, the Department of Personnel submitted its report, and petitioner requested a hearing to rebut what he believed to be factual inaccuracies contained in the Department's account. The parties were informed in April of 1986 that a hearing would be conducted

on June 16, 1986, but, shortly before the scheduled date, the Department of Personnel requested an adjournment. The hearing was ultimately held on July 9, 1986. On August 14, 1986, the Commission issued a decision overturning petitioner's medical disqualification, stating that:

> We have carefully reviewed the documentary and testimonial evidence presented to us. Appellant has demonstrated no psychological nor drug-related difficulties since 1971. No medical disability has been diagnosed since that time. The Department relies primarily on Dr. Petrone's assertion of a 50 percent possibility of recurrence of appellant's disorder and on his concern that appellant's awareness and insight into his illness is low due to his lack of follow-up treatment. This concern, we believe, has been rebutted by appellant's record over the past fifteen years. He has had an exemplary record with the Transit Authority. During that time he has been responsible for driving buses throughout the depot. His duties as a Bus Maintainer "A" would involve few changes from his present position. Only rarely would he be responsible for driving on City streets; these occasions would not involve transporting passengers. His primary driving responsibilities would be within the depot; therefore, the public will not be exposed to risk.
>
> We, therefore, conclude that appellant is capable of performing the duties of a Bus Maintainer "A" at the present time. We also believe that appellant possesses no mental disability that can reasonably be expected to prevent him from carrying out the responsibilities in the future....

The Department of Personnel subsequently advised petitioner that it would not appeal the ruling by the Civil Service Commission. Nonetheless, on August 26, 1986, twelve days after the Commission's determination, the eligible list from which petitioner was to be certified expired. A new list, based upon an examination that had been administered in July of 1986, was published on August 27th. The Department of Personnel, therefore, informed petitioner that he was no longer eligible for the position being sought and would not be certified. Petitioner then requested that the Department place him on a special eligible list so that he could be considered for the Bus Maintainer "A" vacancies that were to be filled in the near future. Respondent Personnel Director denied the request, claiming that it did not have the authority to establish a special eligible list and that petitioner's eligibility terminated with the expiration of the eligibility list. The instant proceeding pursuant to Article 78 of the CPLR ensued.

The Supreme Court denied petitioner's application and, instead, granted respondents' cross motion to dismiss on the ground that the petition failed to state a cause of action. According to the court, "[t]he function of judicial review in an Article 78 proceeding is not to weigh the facts and merits de novo and substitute the Court's judgment for that of the agency's determination, but rather to decide whether such can be supported on any reasonable basis." Petitioner has appealed, arguing that he possesses a property interest in the right to appeal his medical disqualification; that respondents' action in declining to extend his eligibility beyond the duration of the eligibility list circumscribed his right to appeal; that he was not given notice that his right to appeal was so limited; and that respondents' refusal to certify him for Bus Maintainer "A" violates due process and, in addition, was arbitrary, capricious and an abuse of discretion.

Relevant to the matter herein are certain sections of the State Civil Service Law and the New York City Charter. Specifically, Civil Service Law 50(4) provides that:

> Disqualification of applicants or eligibles. The State Civil Service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible...
>
> (b) who is found to have a physical or mental disability which renders him unfit for the performance of the duties of the position in which he seeks employment, or which may reasonably be expected to render him unfit to continue to perform the duties of such position...
>
> No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

Section 812(c) of the New York City Charter authorizes the Civil Service Commission "to hear and determine appeals by any person aggrieved by any action or determination of the personnel director" made pursuant to enumerated provisions of that chapter, and the Commission "may affirm, modify, or reverse such action or determination." Respondents, however, rely upon Civil Service Law 56, which states, in pertinent part, that "[t]he duration of an eligible list shall be fixed at not less than one nor more than four years.... An eligible list that has been in existence for one year or more shall terminate upon the establishment of an appropriate new list, unless otherwise prescribed by the state civil service department or municipal commission having jurisdiction." In that regard, respondents urge that the appointment of a candidate to a civil service position after the expiration of the applicable eligible list is a legal impossibility, citing *Matter*

of New York City Department of Personnel v. New York State Division of Human Rights, 44 N.Y.2d 904, 407 N.Y.S.2d 637, 379 N.E.2d 165; *Matter of Tanzosh v. New York City Civil Service Commission*, 44 N.Y.2d 906, 407 N.Y.S.2d 638, 379 N.E.2d 166; *Matter of Cash v. Bates*, 301 N.Y. 258, 93 N.E.2d 835.

At the outset, it should be noted that while an individual who has performed well on a civil service examination does not have a right to actually receive an appointment, he does possess a property right to be considered for the appointment in question (*Drogan v. Ward*, 675 F.Supp. 832 [SDNY]; see also *Matter of Cassidy v. Municipal Civil Service Commission*, 37 N.Y.2d 526, 375 N.Y.S.2d 300, 337 N.E.2d 752). Moreover, pursuant to Civil Service Law 50(4) and City Charter 812(c), an applicant whose certification as an eligible is rejected because of a physical or mental disability has a statutory right to appeal that disqualification. The right to utilize adjudicatory procedures established by state law also constitutes a property interest (*Logan v. Zimmerman Brush Company*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265). In *Logan v. Zimmerman Brush Company, supra*, the United States Supreme Court held that an administrative appeal process under the Illinois Fair Employment Practices Act was a constitutionally protected property interest.

According to the United States Supreme Court, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property" (*Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548). In the view of the Court therein, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law..." (*Board of Regents v. Roth, supra*, at 577, 92 S.Ct. at 2709; see also *Cleveland*

Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494). At a minimum, due process necessitates that the "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case" (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656–57, 94 L.Ed. 865). As the Supreme Court declared in *Board of Regents v. Roth*, *supra*, a state may not, in regulating eligibility for employment, preclude access in a manner that contravenes due process and denies the right to a prior hearing (see also *Cleveland Board of Education v. Loudermill*, *supra*). Thus, before an individual can be divested of any meaningful property interest, due process mandates that he be accorded an opportunity to be heard (*Cleveland Board of Education v. Loudermill*, *supra*; *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780,28 L.Ed.2d 113). The New York State Court of Appeals has similarly determined that "[f]undamental notions of procedural due process require that before the State may deprive a person of a significant property interest in aid of a creditor, that person be given notice and an opportunity to be heard prior to deprivation of that interest" (*Sharrock v. Dell Buick–Cadillac, Inc.*, 45 N.Y.2d 152, 163, 408 N.Y.S.2d 39, 379 N.E.2d 1169).

Respondents concede that where an applicant files a judicial action prior to the expiration of an eligible list, the fact that the term of the list expires during the pendency of the litigation does not preclude relief. Indeed, the Court of Appeals has expressly held that a person is not foreclosed from seeking a civil service position when a judicial proceeding to compel appointment is commenced prior to the expiration of the eligible list (*Matter of Mena v. D'Ambrose*, 44 N.Y.2d 428, 406 N.Y.S.2d 22, 377 N.E.2d 466; *Matter of New York City Department of Personnel v. New York State Division of Human Rights*, *supra*; *Matter of Tanzosh v. New*

York City Civil Service Commission, supra). However, respondents contend that the foregoing is a limited exception to the rule that there can be no appointment subsequent to the termination of the eligible list on which the applicant's name appears. Since petitioner herein did not institute his judicial proceeding until after the list had expired, respondents assert, he is barred from demanding that he be placed on a special list. Respondents' argument in this respect is unpersuasive.

The United States Supreme Court has rejected the sort of distinction which respondents are attempting to make between administrative procedures and judicial proceedings. In *Logan v. Zimmerman Brush Company, supra*, the Court stated that due process not only protects civil litigants who seek redress in the courts but also prevents the state from denying persons recourse to established adjudicatory procedures "when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s]' [citation omitted]" (455 U.S. at 429–430, 102 S.Ct. at 1154). That case involved the Illinois Fair Employment Practices Act, which barred employment discrimination on the basis of physical handicap unrelated to ability. It also provided for a comprehensive scheme for adjudicating allegations of discrimination. To obtain relief, a complainant had to bring a charge of unlawful conduct before the Illinois Fair Employment Practices Commission within 180 days of the occurrence of such purported conduct. The statute then gave the Commission 120 days within which to convene a factfinding conference and explore the possibility of a settlement. If the Commission found substantial evidence of illegal conduct, it was to attempt to eliminate the effect thereof by means of conference and conciliation, and, if that proved impossible, to issue a formal complaint against the employer. Although appellant filed a timely complaint of discrimination against his employer, the Commission scheduled the conference for a date five days after the

expiration of the 120 day statutory period. The Commission thereafter denied the employer's motion that the charge against it be dismissed for failure to hold a timely conference. On appeal, the Illinois Supreme Court concluded that because it had not complied with the 120–day requirement, the Commission no longer had jurisdiction to consider the com–plaint. However, the United States Supreme Court reversed, holding that the right to use the Fair Employment Practices Act adjudicatory procedures was a constitutionally protected property interest.

In *Matter of Pan American World Airways, Inc. v. New York State Human Rights Appeal Board*, 61 N.Y.2d 542, 475 N.Y.S.2d 256, 463 N.E.2d 597, the New York State Court of Appeals gave recognition to the authority of *Logan v. Zimmerman Brush Company*, *supra*, when it determined that "[t]he Human Rights Law provision that bases employer liability upon a finding of discrimination creates a constitutionally protected interest" (at 548, 475 N.Y.S.2d 256, 463 N.E.2d 597), specifically mentioning the United States Supreme Court case. Further, the Court of Appeals declared that "a claim under this statute may not be finally dismissed consistent with due process unless an opportunity is granted for a hearing appropriate to the nature of the case" (at 548, 475 N.Y.S.2d 256, 463 N.E.2d 597). Although the Court did uphold the dismissal by the State Division of Human Rights of certain complaints before it on the ground of administrative convenience, as authorized by Executive Law 297, the Court proceeded to note that because a lawsuit may be instituted as if a complaint had never been filed where the complaint is dismissed for administrative convenience, "complainants here could maintain the same type of action under the Human Rights Law in State court and receive a hearing on the merits in satisfaction of due process" (at 548–549, 475 N.Y.S.2d 256, 463 N.E.2d 597). Again, the Court of Appeals referred to *Logan v. Zimmerman Brush Company*, *supra*.

Consequently, the Court of Appeals permitted the dismissal of the administrative complaints to stand only because the complainants had a legal remedy -- they could commence litigation.

Respondents, however, urge that *Matter of Tanzosh v. New York City Civil Service Commission, supra*, is dispositive of the instant matter. In that case, the Court of Appeals, in an opinion affirming the First Department's dismissal of the Article 78 proceeding therein, stated that [44 N.Y.2d at 907, 407 N.Y.S.2d 638, 379 N.E.2d 638, 379 N.E.2d 266]:

> Petitioner did not commence this Article 78 proceeding seeking appointment until after the subject list of eligibles had expired. Accordingly, the Courts may grant him neither appointment from that expired list [citations omitted], nor the equivalent relief he now seeks of retroactive seniority in his subsequently obtained civil service position [citation omitted]. We express no view as to what would be the proper result had petitioner instead commenced a proceeding prior to the expiration of the list and that proceeding had been dismissed for a failure to exhaust his administrative remedies. [brackets added]

It is crucial that *Matter of Tanzosh v. New York City Civil Service Commission, supra*, was decided some four years before the United States Supreme Court handed down *Logan v. Zimmerman Brush Company, supra*, that it did not address the constitutional issue involved and, moreover, that it is factually distinguishable from the situation before us now. In *Matter of Tanzosh v. New York City Civil Service Commission, supra*, the eligible list had terminated on March 5, 1975, fully eight months *before* petitioner was found qualified (on November 3, 1975) for the position being sought. The Department of Personnel could not have certified peti-

tioner prior to the expiration of the list because, at the time, he was not considered medically capable of the appointment. In the present matter, the eligible list did not expire until after the appeal process had been completed, and petitioner was determined to be qualified *before* the expiration of the list. While the Department of Personnel could have considered petitioner for the position after he won his administrative appeal, it failed to do so. (There were, at the time, apparently four vacancies for the position being sought by petitioner.) Instead, the Department simply allowed the life of the list to expire. Thus, by its own inaction, the Department of Personnel was able to nullify the entire statutorily authorized appeal process.

Indeed, the situation concerning petitioner here is, if anything, even more egregious than that confronting the appellant in *Logan v. Zimmerman Brush Company, supra*. In the latter case, the administrative process, having been aborted by the Illinois Supreme Court, never took place while, in the instant situation, petitioner went through the entire statutory appellate procedure and prevailed, only to have respondents render meaningless his successful appeal.

It should also be noted that no city or state statute or regulation restricts the right to appeal a physical or mental disqualification to the duration of the eligible list. The only time period prescribed anywhere is contained in Rule 8.3.3(a) of the Rules and Regulations of the City Personnel Director, which requires that the appeal must be filed within thirty days of the notification of the adverse action. Respondents, however, have not only adopted a limitation not authorized by law, but do not even advise applicants such as petitioner that all statutory appeal rights are terminated at the expiration of the list. Therefore, an applicant is not informed that it is essential for him to monitor the progress of the eligible list so that he can institute a judicial proceeding prior to its

expiration. (Then, ironically, respondents could claim that the petitioner had not exhausted his administrative remedies).

While it is true that in *Matter of Mena v. D'Ambrose*, *supra*, the Article 78 proceeding was commenced one month prior to the expiration of the eligible list, it is instructive to quote from the opinion of the Court of Appeals therein (44 N.Y.2d at 433, 406 N.Y.S.2d 22, 377 N.E.2d 466):

> It is undisputed that petitioners' scores were improperly computed resulting in an inaccurate eligible list as to them and they were aggrieved thereby. Thus they are entitled to the continuation of a *special eligible list*, consisting of the names of the three petitioners, for a period consistent with section 56 commencing at the time when the list was corrected. The list, as continued, will be subject to the applicable Civil Service Law provisions, such as section 61 which provides for the selection of one-out-of-three certified persons. Thus the list shall continue until such time as one of the petitioners is appointed pursuant to the Civil Service Law or until it expires by operation of section 56, whichever occurs first. To apply the statute in the strict and inflexible manner suggested by the dissent would in effect allow the respondents to circumvent the provisions of the Civil Service Law which require appointment in accord with specified standards. These standards were adopted pursuant to the constitutional direction that all appointments be made on the basis of merit and fitness. Although there does exist a strong policy that appointments be made from contemporary lists, *this policy must be secondary to the constitutional mandate* governing appointment which is implemented by the Civil Service Law standards. [emphasis added]

Therefore, the Court of Appeals has expressly asserted that state constitutional imperatives take precedence over any possible consideration of public policy with respect to utilizing the most current eligible lists possible. Indeed, the first and foremost public policy is that constitutional requirements be observed, particularly where, as here, the constitutional standard has been established by the United States Supreme Court. Further, contrary to what was at issue in *Hurley v. Board of Education*, 270 N.Y. 275, 200 N.E. 818, wherein the Court of Appeals held that a defunct list may not constitutionally be revived, petitioner in the instant matter is not seeking to extend the duration of the old list; he is requesting that this court fashion precisely the same remedy as did the Court of Appeals in *Matter of Mena v. D'Ambrose*, *supra*. In *Matter of Mena v. D'Ambrose*, *supra*, the court specifically distinguished *Hurley v. Board of Education*, *supra*, from the matter before it therein. Consequently, the issue here is not the specific remedy involved -- the Court of Appeals in *Matter of Mena v. D'Ambrose*, *supra*, deemed the creation of a special list to be appropriate -- but whether the relief is limited to a party who has instituted a judicial proceeding prior to the expiration of the list, as urged by respondent Department of Personnel, or must also be available to someone who has commenced an administrative appeal before the termination of the list. In view of the clear holding of the United states Supreme Court in *Logan v. Zimmerman Brush Co.*, *supra*, that the right to invoke a statutory adjudicatory procedure is a constitutionally protected property interest, no other conclusion is possible except that the remedy ordered in *Matter of Mena v. D'Ambrose*, *supra* must also be accorded to an individual who has filed an administrative appeal during the life of the list.

The fact is that acceptance of respondents' reasoning would make petitioner's ability to invoke his right to appeal entirely subject to the arbitrary and capricious whim of the

municipal authority. A city agency can simply, inadvertently or with deliberation, delay the appeal process. Sufficient delay will inevitably result in the expiration of the eligible list. By that means, an applicant would be deprived of his right to appeal through no fault of his own, and he would be totally without legal resort. Indeed, a legal right which can be so easily circumvented, whether unintentionally or wilfully, is no right at all. In the instant matter, the eligible list from which petitioner was to be certified expired twelve days after the Civil Service Commission issued its determination. Under respondents' interpretation of the law, petitioner could only have protected his interests by commencing a judicial proceeding. Yet, he could not have brought a court suit prior to exhausting his administrative remedies, which occurred only twelve days before the life of the eligible list terminated. Since petitioner won his administrative appeal and, therefore, was not aggrieved by the Commission's decision, he could hardly challenge it in court even had his attorney been able to prepare and file the papers in the short time available. Respondents would, thus, have the appeal process rendered an enormous waste of time, effort and resources, and, even worse, petitioner, would, in effect, have been deprived of any right to dispute the initial finding of mental incapacity. This is simply a violation of his right to due process, and it is regrettable that respondents do not perceive that their construction of Civil Service Law 56 would leave petitioner and others similarly situated without meaningful legal redress.

Significantly, the Department of Personnel's failure to provide notice of its self-imposed duration-of-the-list requirement has led the New York City Civil Service Commission to invalidate as a violation of due process the very practice being challenged here. In *Matter of Assing*, which involved the consolidated appeals of twenty-one

employees whose situation was similar to that of petitioner herein, the Civil Service Commission noted that:

> The position of the Department of Personnel renders meaningless the right of appeal guaranteed in the City Charter. To accept Personnel's position would require all persons aggrieved by Personnel Director actions to immediately institute an Article 78 proceeding in order to prevent being denied consideration should the eligible list expire during the pendency of the appeal to the Civil Service Commission. Requiring appellants to routinely seek judicial intervention to protect their places on the eligible lists should they prevail at the Commission would be a waste of judicial resources.

As the Civil Service Commission aptly pointed out later in that same opinion, "the right of appeal articulated in the City Charter contains limitations only as to time for filing and subject matter. If the right to appeal is restricted by the duration of the eligible list, then due process requires that appellants be so notified." Thus, the Commission has rejected almost precisely the arguments being advanced by respondents in connection with the instant appeal, including their claim that *Matter of Tanzosh v. New York Civil Service Commission*, *supra*, is controlling.

There is no material difference between *Logan v. Zimmerman Brush Company*, *supra*, in which it was found to be an unconstitutional deprivation of a property right to dismiss an employee's statutory administrative complaint (because the fact finding hearing was not convened by the commission within the prescribed time period) and the present case, where the employee has prevailed on the statutory administrative appeal while the eligible list is still in effect and while vacancies exist, but the municipality never makes the appointment and allows the list to expire. If anything, the

instant situation presents a more constitutionally offensive scenario.

Where the law provides an applicant with the right to appeal a medical disqualification, a state or municipal agency may not constitutionally deprive him of that right without statutorily mandated notice. Moreover, it was due to the erroneous determination on the part of the Transit Authority and the Department of Personnel that petitioner was not psychologically qualified to be a Bus Maintainer "A" that compelled him to invoke administrative proceedings to vindicate his rights. Respondents may not now rely upon the fact that the eligible list expired shortly thereafter to support their claim that petitioner cannot be considered for appointment. "Inasmuch as he filed his complaint [administrative proceeding] before expiration of the list, the expiration thereof does not preclude relief" (*Matter of State Division of Human Rights v. County of Onondaga*, 84 A.D.2d 931, 447 N.Y.S.2d 61 [brackets added]).

Accordingly, order of the Supreme Court, New York County (Kenneth L. Shorter, J.), entered on May 13, 1987, which denied the petition pursuant to Article 78 of the CPLR and granted respondents' cross-motion to dismiss the petition, should be reversed on the law, the petition granted, the cross-motion to dismiss denied, and respondents are directed to place petitioner's name on a special eligible list for Bus Maintainer "A", without costs or disbursements.

Order, Supreme Court, New York County (Kenneth Shorter, J.), entered on May 13, 1987, reversed, on the law, the petition granted, the cross-motion to dismiss denied, and respondents directed to place petitioner's name on a special eligible list for Bus Maintainer "A", without costs and without disbursements.

All concur except WALLACH, J., who concurs in a separate opinion and SANDLER, J.P., and SULLIVAN, J., who dissent in an opinion by SULLIVAN, J.

WALLACH, Justice (concurring).

I do not think that *Matter of Tanzosh v. New York City Civ. Serv. Comm.*, 44 N.Y.2d 906, 407 N.Y.S.2d 638, 379 N.E.2d 166, and *Matter of New York City Dep't. of Personnel v. New York State Div. of Human Rights*, 44 N.Y.2d 904, 407 N.Y.S.2d 637, 379 N.E.2d 165, can be factually distinguished from the situation presented in this case. But what persuades me to vote for reversal is that strict application of the rule in those decisions results in an unconstitutional denial of a due process opportunity to be heard, and also an impermissible withholding of equal protection of law.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265, the United States Supreme Court held that to deny Logan relief on the basis of a loss of jurisdiction by the Ohio regulatory agency charged with preventing employment discrimination would be to countenance the denial of procedural due process by foreclosing his right to a hearing on the merits. That, indeed, was the thrust of the first opinion for the *Logan* court by Justice Blackmun, with five other Justices concurring. In a second "separate" opinion, Justice Blackmun, joined by three other Justices,[1] found that Logan was also denied equal protection because the Ohio statutory scheme, if applied, created an irrational class distinction, namely, one group for whom the agency acted timely could succeed, but the second disfavored

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[1] The case is unusual in that one Justice wrote two opinions.

group (for whom the agency might act tardily) would inevitably fail to obtain a hearing.

The New York scheme under review here reveals a more irrational distinction than that found unconstitutional in Ohio.[2] The first distinction to fall short of equal protection is the differentiation of those litigants who pursue administrative relief rather than a premature action in the courts. Expressly left "open" in *Tanzosh* (supra) was the effect of commencing an action -- albeit doomed to defeat for failure to exhaust the administrative remedy -- and whether this step would preserve the petitioner's right to litigate over an "expired" list. Even more pertinent here is the artificial distinction drawn between the petitioner who prevails in the administrative proceeding, and the one who does not.

Paradoxically it is the second unsuccessful petitioner who ends up in a better position: he at least has standing to institute an immediate Article 78 petition as a party aggrieved. By the same token, the "winner" at the agency is deprived of access to the courts for lack of aggrievement, but if the agency should delay until the relevant list expires, that petitioner's rights are extinguished. Yet that is precisely the effect of the dissenters' position, and why it violates due process both in its equal protection, as well as procedural, sense.

Accordingly, I vote to reverse.

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[2] It would appear that these due process arguments were not made, and therefore not addressed, by the Court of Appeals in *Matter of Tanzosh*, and *Matter of New York city Dep't. of Personnel, supra*.

SULLIVAN, Justice (dissenting).

Petitioner, employed by the Transit Authority as a Maintainer Helper B, passed an examination for promotion to the position of Bus Maintainer A in October 1983, and was placed on the eligible list established on March 21, 1984. In August 1984, as part of the testing for the position, he was examined by a Transit Authority psychiatric consultant. As a result of the examination, he was medically disqualified due to a history of schizophrenia and drug abuse.

Petitioner appealed this decision to the New York City Department of Personnel, which conducted a second psychiatric examination in March 1985. After its psychiatric consultant also concluded that petitioner should be disqualified for the position due to the risk of recurrence of his psychopathology, the Department of Personnel disqualified him for promotion in April 1985.

Petitioner thereafter appealed this decision to the New York City Civil Service Commission. A hearing was held, and, by decision dated August 14, 1986, the Civil Service Commission overturned petitioner's medical disqualification, noting his "exemplary record with the Transit Authority", and finding that "the public [would] not be exposed to risk" by his promotion. In concluding that he was qualified to perform the duties of Bus Maintainer A, the Commission also expressed the view that he did not suffer from any "mental disability that can reasonably be expected to prevent him from carrying out the responsibilities in the future."

On September 4, 1986, the Department of Personnel advised petitioner that it had decided not to appeal the decision and would certify him for the promotion. Thereafter, the Department learned that it was unable to do so, since a new examination had been administered for the Bus

Maintainer A position in July 1986 and a new list established. The list on which petitioner's name appeared had expired on August 26, 1986.

Accordingly, on September 5, 1986, the Department of Personnel informed petitioner that he was no longer eligible for the position he sought, and would not be certified. By letter dated September 26, 1986, it denied his request that he be placed on a "special eligible list", advising him that it lacked the authority to establish such a list.

Petitioner thereupon commenced this proceeding, alleging that the failure to certify him, based on the expiration of the eligible list, was arbitrary and capricious and violative of his rights under the due process clauses of the New York State and United States Constitutions. The court hearing the matter granted the motion of respondents, the New York City Department of Personnel and its Director, to dismiss. We would affirm.

Pursuant to Civil Service Law § 56, the list on which petitioner's name appeared expired when a new list, based on the more recent examination, was created. Once this occurred, the Department of Personnel was without power to certify petitioner for the position he sought. The New York State Constitution, Article V, section 6, provides: "Appointments and promotions in the civil service of the state and all of the civil divisions thereof...shall be made according to merit and fitness to be ascertained, as far as practicable, by examinations, which, as far as practicable, shall be competitive." In *Hurley v. Board of Education of City of New York*, 270 N.Y. 275, 200 N.E. 818, the Court of Appeals interpreted Article V to invalidate legislation permitting the hiring for civil service employment of applicants whose names appeared on an eligible list which had terminated by reason of the creation of a new list. In holding that the

Legislature was constitutionally without the power to command appointments from an expired list, the court stated:

> A competitive examination may demonstrate merit and fitness, at the time of the examination. As time passes, its value as a test of merit and fitness diminishes. Others may, then, be better prepared and more fit to fill a position than those who are upon the list. The Legislature, or administrative boards or officers, to whom that function has been delegated under appropriate instructions, may determine how long an existing list shall remain in force and when a new examination shall be held. While the list, prepared in 1928, was still in force, the Legislature exercised that power, without challenge, by extending the life of the list for one year. When that period had passed and a new eligible list was prepared and published, the Legislature was without power to revive the old list. Those on the old list were then no longer eligible for appointment, and the Legislature is without power to confer eligibility. That must be ascertained solely by competitive examination. (*Id.* at 280, 200 N.E. 818.)

The Court of Appeals reiterated this rule in *Matter of Cash v. Bates*, 301 N.Y. 258, 261, 93 N.E.2d 835, stating, "[A]ppointment of any of the petitioners after the expiration of the eligible list was a legal impossibility." (*See, also, Matter of Tanzosh v. New York City Civ. Serv. Comm.*, 44 N.Y.2d 906, 407 N.Y.S.2d 638, 379 N.E.2d 166, *affg.* 58 A.D.2d 522, 395 N.Y.S.2d 185; *Matter of New York City Dept. of Personnel v. New York State Div. of Human Rights*, 44 N.Y.2d 904, 407 N.Y.S.2d 637, 379 N.E.2d 165, *affg.* 58 A.D.2d 787, 396 N.Y.S.2d 845.)

In *Matter of Mena v. D'Ambrose*, 44 N.Y.2d 428, 406 N.Y.S.2d 22, 377 N.E.2d 466, the Court of Appeals announced a limited exception to the bar against appointments subsequent to the expiration of the eligible list. There, pursuant to court order and shortly before it was due to expire, the eligible list was adjusted as to one candidate and subsequently readjusted to reflect, as well, the corrected status of the petitioners, who had commenced a judicial proceeding during the life of the list. The court held, "[T]hat the list expired during the course of the litigation ought not and does not preclude relief" (*id.* at 433, 406 N.Y.S.2d 22, 377 N.E.2d 466), and ruled that the statutory time period for the life of the list did not begin to run until the errors were corrected. In another case decided the same year, *Matter of Tanzosh v. New York City Civ. Serv. Comm.*, *supra*, 44 N.Y.2d 906, 407 N.Y.S.2d 638, 379 N.E.2d 166, the Court of Appeals held that where the petitioner "did not commence this article 78 proceeding seeking appointment until after the subject list of eligibles had expired ...the courts may grant him neither appointment from that expired list [citations omitted] nor the equivalent relief he now seeks of retroactive seniority in his subsequently obtained civil service position [citations omitted]." (*Id.*, at 907, 407 N.Y.S.2d 638, 379 N.E.2d 166; *see, also, Matter of New York City Dept. of Personnel v. New York State Div. of Human Rights*, *supra*, 44 N.Y.2d 904, 407 N.Y.S.2d 637, 379 N.E.2d 165.)

Petitioner, citing *Matter of State Div. of Human Rights v. County of Onondaga*, 84 A.D.2d 931, 447 N.Y.S.2d 61, argues that the commencement of his administrative proceeding during the life of the eligible list should entitle him to be appointed following the expiration of the list. That case, however, is inconsistent with the holding in *Tanzosh* and thus was not binding on the Department of Personnel, which was obliged to follow the authority of the Court of Appeals. In any event, *County of Onondaga* was decided on an ap-

parent misreading of *Matter of Mena v. D'Ambrose, supra*, 44 N.Y.2d 428, 406 N.Y.S.2d 22, 377 N.E.2d 466, which the Fourth Department cited in holding that relief was not barred even though the eligible list had expired, since the complainant had filed a complaint with the State Division of Human Rights before the list's expiration. As both *Mena*, 44 N.Y.2d at 432–433, 406 N.Y.S.2d 22, 377 N.E.2d 466, and *Tanzosh*, 44 N.Y.2d at 907, 407 N.Y.S.2d 638, 379 N.E.2d 166, make clear, however, relief may be granted only if a judicial proceeding is commenced before expiration of the eligible list.

Petitioner also argues that the Department of Personnel acted improperly when it did not certify him for appointment immediately following the Civil Service Commission decision. The Department, however, pursuant to CPLR Article 78, had four months to consider whether to appeal the Commission's decision. Moreover, petitioner's non-appointment was not necessarily caused by respondents' delay in certifying him. Even had the Department of Personnel certified petitioner on the day of the Civil Service Commission decision, there is no guarantee that he would have been appointed in the short interval -- twelve days -- prior to the expiration of the eligible list. It should be noted that no other applicant was appointed from the eligible list in the interval between the Civil Service Commission decision and the expiration of the list.

As the motion court properly noted, the determination of an administrative agency will not be disturbed where it has a reasonable basis. (*Matter of Clancy-Cullen Stor. Co. v. Board of Elections of City of N.Y.*, 98 A.D.2d 635, 469 N.Y.S.2d 391.) Respondents' determination that petitioner could not be certified for promotion was not only reasonable, but mandated by applicable law.

In granting the petition and directing that respondents place petitioner's name on a special eligible list, the majority holds, erroneously, in our view, that respondents' non-certification of petitioner deprived him of a property right without due process of law. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions...defined by existing rules or understandings that stem from an independent source such as state law...." (*Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548; *see, also, Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494; *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684; *Perry v. Sindermann*, 408 U.S. 593, 599–603, 92 S.Ct. 2694, 2698–2700, 33 L.Ed.2d 570.) In this regard, the Supreme Court has repeatedly held that individual entitlement grounded in state law and defeasible only for cause is the hallmark of a property interest. (*Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11–12, 98 S.Ct. 1554, 1561, 56 L.Ed.2d 30; *Goss v. Lopez*, 419 U.S. 565, 573–574, 95 S.Ct. 729, 735–36, 42 L.Ed.2d 725; *Board of Regents v. Roth*, *supra*, 408 U.S. at 576–578, 92 S.Ct. at 2708–10.) Under well-settled New York law, petitioner does not have a property interest in an appointment to the position he sought. "The mere appearance of petitioner's name on an eligible list was a subjective 'expectancy' and did not create any vested right to appointment [citations omitted]." (*Matter of Tanzosh v. New York City Civ. Serv. Comm.*, *supra*, 58 A.D.2d at 523, 407 N.Y.S.2d 638, 379 N.E.2d 166.)

Relying on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265, however, the majority holds that petitioner's right to appellate review of his medical disqualification is a property interest protected by the due process clause. *Logan* is inapposite. In *Logan*, Illinois state law provided the claimant with the right of review of his

employment discrimination claim. The review procedures required that a fact-finding conference be scheduled within 120 days. Inadvertently, the state agency neglected to schedule the conference until after the expiration of the statutory period, and the claim was dismissed for lack of jurisdiction. The Supreme Court held that the right to a hearing under the statutory scheme was a property right of which the state, by its rigid application of the 120-day limitation, had arbitrarily deprived claimant.

While petitioner does have a right, as a matter of state law, to an adjudicatory process which includes judicial as well as administrative review of an adverse determination, any right of redress is, of necessity, as the Court of Appeals has held, circumscribed by the life of the eligible list on which his name appears. (*See, Matter of Tanzosh v. New York City Civ. Serv. Comm., supra*, 44 N.Y.2d 906, 407 N.Y.S.2d 638, 379 N.E.2d 166; *Matter of Mena v. D'Ambrose, supra*, 44 N.Y.2d 428, 406 N.Y.S.2d 22; 337 N.E.2d 466; *Matter of New York City Dept. of Personnel v. New York State Div. of Human Rights, supra*, 44 N.Y.2d 904, 407 N.Y.S.2d 637, 379 N.E.2d 165.) This restriction is more than a mere procedural limitation on petitioner's right of access to the state's adjudicatory procedures, as was the case in *Logan*. New York's interest in limiting appointments to current eligible lists as required by Article V, section 6 of the New York State Constitution (*see, Hurley v. Board of Education of City of New York, supra*, 270 N.Y. 275, 200 N.E. 818) is a substantial one. The states are free to create substantive adjudicatory defenses or immunities to the rights they create and, in so doing, they do not offend due process notions. (*See, Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481.) Thus, the proscription against an appointment from an expired eligible list is "merely one aspect of the...definition of [the] property interest" New York has created. (*Id.* at 282, n.5, 100 S.Ct. at 557, n.5; *cf. Ferri*

v. Ackerman, 444 U.S. 193, 198, 100 S.Ct. 402, 406, 62 L.Ed.2d 355.) Indeed, *Logan* held that "the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." (455 U.S. at 437, 102 S.Ct. 1148, citing cases.) It should also be noted that the constitutional issue was presented in *Tanzosh*, decided several years before *Logan*, both in this court and the Court of Appeals, and implicitly rejected.

The speculation by Justice Wallach in his concurring opinion that any judicial proceeding commenced prior to final resolution of petitioner's administrative appeal would be dismissed because of failure to exhaust his administrative remedies ignores the court's reservation in *Tanzosh*. The court specifically left open the question "as to what would be the proper result had petitioner instead commenced a proceeding prior to the expiration of the list and that proceeding had been dismissed for a failure to exhaust his administrative remedies." (44 N.Y.2d at 907, 407 N.Y.S.2d 638, 379 N.E.2d 166.) Equally unavailing is the argument that a second state-created classification exists consisting of those applicants who, although successful in their administrative challenge, are deprived of access to the courts for lack of standing since they are not aggrieved. In reaffirming the principle that the courts may not direct appointment from an expired list, the Court of Appeals in *Tanzosh* recognized, in effect, only one classification of applicant -- the rejected candidate seeking vindication of his asserted right to appointment. His right to the state's adjudicatory process is limited only to the extent that he may not be appointed after expiration of the eligible list. Thus, in the context of the issue before us, his only concern is with the demise of the list before commencement of a judicial proceeding to compel appointment. (*See*, *Matter of Mena v. D'Ambrose*, *supra*, 44 N.Y.2d 428, 406 N.Y.S.2d 22, 377 N.E.2d 466.) The question of whether he is barred from the

state's review processes in the event he commenced a judicial proceeding before exhaustion of his administrative remedies is the question left open by the Court of Appeals. In light of the definitive holding in *Tanzosh* and the clearly delineated reservation as to non-exhaustion of administrative review, it ill-behooves this court to hold New York's review process unconstitutional. Although we also share the majority's discomfort with the conundrum into which petitioner has been placed, we do not perceive that applicable law permits the result reached by the majority, no matter how laudatory its motives.

None of the other cases cited by petitioner compels a finding that the requirement that appointments be made only from the current eligible list deprived him of his due process right to appellate review. In *Matter of Pan Amer. World Airways v. New York State Human Rights Appeal Bd.*, 61 N.Y.2d 542, 475 N.Y.S.2d 256, 463 N.E.2d 597, the Court of Appeals held that the State Division of Human Rights could dismiss a claim for administrative convenience even though "[t]he Human Rights Law provision that bases employer liability upon a finding of discrimination creates a constitutionally protected property interest [citation omitted]." (*Id.* at 548, 475 N.Y.S.2d 256, 463 N.E.2d 256.) The court's finding that there had not been a due process violation was based on the fact that the complainants had the option of commencing a judicial proceeding, a choice which likewise was available to petitioner up until the expiration of the eligible list.

Finally, petitioner's contention that the Department of Personnel was required to furnish him with notice that the eligible list on which his name appeared was about to expire is without merit. He was on notice that, pursuant to Civil Service Law § 56, an eligible list has a minimum duration of not less than one nor more than four years. There is no

provision in the Civil Service Law or elsewhere which requires the Department of Personnel to inform a candidate that the eligible list on which his name appears is about to expire. Nor is there any authority holding, or even suggesting, that petitioner, who was represented by counsel, was entitled to be informed of the well-settled law requiring him to commence a judicial proceeding before the expiration of the list.

Accordingly, the judgment dismissing the petition should be affirmed.

APPENDIX D

**Decision of the Supreme Court,
State of New York, County of New York
Entered May 13, 1987**

Index No. 01707/87

DECISION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 49
----------x

In the Matter of the application of
MELVIN DEAS,

Petitioner,

For a judgment pursuant to Article 78
CPLR

-against-

JUDITH LEVITT, In her Official Capacity
as City Personnel Director, and NEW
YORK CITY DEPARTMENT OF PERSONNEL,

Respondents,

----------x

SHORTER, J.:

Plaintiff moves for an order declaring the action of respondents (in refusing to establish a special eligible list and refusing to certify Petitioner) a) arbitrary and capricious and an abuse of discretion; and (b) in violation of the due process clause of the New York State Constitution and United States Constitution. Respondents cross-move pursuant to CPLR 3211(a) (7) and 7804(F) to dismiss the petition on the grounds that it fails to state a cause of action.

Petitioner is a candidate for the Civil Service position of a Bus Maintainer A (BMA) with the New York City Transit Authority. Petitioner was disqualified medically for the position in September, 1984; but later he was found to be qualified on August 14, 1986. However, to-date he has not been appointed to the position sought. Petitioner now seeks an order to direct Respondents to constitute him a prior eligible for the above position. We find the DUE PROCESS issue to be without merit.

In early 1984 Petitioner was a candidate for the Civil Service position of Bus Maintainer A within the New York City Transit Authority. Petitioner was found disqualified medically in September, 1984. After an appropriate appeal to the Department of Personnel in March, 1985, he was found medically acceptable on August 14, 1986. Twelve days later a new list for the same position was promulgated inasmuch as the list for which Petitioner competed expired on August 6, 1986. Petitioner seeks establishment of a special priority eligibility list in his favor.

Petitioner's motion for a judgment pursuant to Article 78 of the CPLR is DENIED.

Respondent's cross-motion pursuant to CPLR 3211(a)(7) and CPLR 7804(F) dismissing the petition on the grounds that it fails to state a cause of action is GRANTED. The function of Judicial review in an Article 78 proceeding is not to weigh the facts and merits de novo and substitute the Court's judgment for that of the agency's determination, but rather to decide whether such can be supported on any reasonable basis. *Matter of Clancy-Cullen Storage Co. vs Board of Elections of the City of New York*, 98 AD2d 635.

DATED: May 6, 1987

FILED: May 13, 1987

APPENDIX E

Decision of the New York City Civil Service Commission Issued August 14, 1986 (Item No. C86-1409, Cal. No. H-291)

NEW YORK CITY CIVIL SERVICE COMMISSION

MELVIN DEAS

Melvin Deas appeals from a determination by the City Personnel Director which found him not qualified for promotion to the position of Bus Maintainer "A" because he was deemed "psychologically unsuited" for the position. Appellant has been employed by the Transit Authority since 1965. For the last four years, his title has been (and still is) Maintainer Helper "B".

Section 50(4)(b) of the State Civil Service Law provides that an applicant may be refused certification if he is suffering from a disability that either renders him unfit to perform the duties of the position sought or which may reasonably be expected to render him unfit to carry out the responsibilities of the position in the future. An evidentiary hearing was held by this Commission in order to establish both appellant's present ability to perform the duties of a Bus Maintainer "A" as well as his anticipated capability to continue to carry out the necessary functions.

The record establishes that in 1967 appellant was hospitalized in the Army and was given a medical discharge. He admitted himself to the Brooklyn Veterans Hospital in

1971 and, according to hospital records, received treatment for paranoid schizophrenia and drug abuse. Appellant was discharged from the Veterans Hospital after sixty-three days. The VA physician reported appellant had shown "tremendous improvement, was relevant, coherent and capable of working after discharge." Thereafter, he resumed his duties as a car cleaner with the New York City Transit Authority.

In 1979, appellant sought a promotion to Maintainer Helper "B". In connection therewith he received a psychological evaluation which stated that his schizo-affective disorder was in remission but that appellant was not to operate a bus. Three years later appellant again sought promotion to Maintainer Helper "B", and successfully achieved the position. After a conclusion by a Transit Authority medical examiner that he was medically qualified, his promotion was approved. In 1983 appellant was turned down by the Transit Authority and the Department of Personnel for the position of Bus Maintainer "A" because he was psychologically unsuitable. This appeal followed.

At an evidentiary hearing, appellant testified that he as been drug-free since 1971 and has had no psychological incidents since that time. He asserts that his work performance has been exemplary and has submitted numerous recommendations from his supervisors and fellow workers in support of his claim. His duties have included the inspection of buses and the diagnosis of their defects. He has been required to operate a bus in order to move the vehicle from one part of the depot to another. To operate the buses, appellant passed a training program with the Transit Authority and secured a bus drivers license. His testimony established that he drove a total of no more than two miles a day within the confines of the depot.

Dr. Marvin Meyers, a psychologist testifying on behalf of appellant, stated that he examined appellant on three separate occasions for a total of three and one-half hours. He administered various tests, including a Rorschach Test, a Thematic Apperception Test and a Draw-a- Person Test. He found appellant to be articulate, cogent and alert. His test result revealed no psychosis; nor was any neurosis, or schizophrenic disorder evident. He further testified that, in his opinion, an individual who has shown no signs of mental disorder in over fifteen years and who has presented himself as a capable, mature, responsible and stable person, is free from psychological problems and no longer a risk to himself or the people around him. He stated the test results verify his conclusion.

The Department of Personnel contends that a review of appellant's history plus a twenty- to thirty-minute interview by a Department psychiatrist produced sufficient cause to disqualify appellant for the position of Bus Maintainer "A". Testifying on behalf of the Department, Dr. Joseph Petrone stated that appellant had been denied a promotion because he had a possible schizophrenic disorder and a possible drug dependency. He testified that he based his decision on the following factors: Appellant had been diagnosed as schizophrenic and drug dependent in 1971; he had sought no medical attention since his release from the hospital and therefore no checks have been made on appellant's alleged rehabilitation; a 1979 evaluation of appellant's psychological condition states that though his disorder was in remission, he was not to operate a bus with or without passengers; and finally an interview with appellant showed that his speech was pressured, his thought processes were discontinuous and he was religiously preoccupied. Dr. Petrone further testified that "hog", one of the drugs appellant has admitted using, is a form of PCP. PCP, he said, has been known to produce after-effects years after its ingestion. He also stated that

there is a fifty (50) percent chance of recurrence once an individual has had one schizophrenic episode.

The Department presented a second expert witness, Julio Albino, a department supervisor for the Transit Authority. He testified that a Bus Maintainer "A" would be required to operate a bus within the confines of a depot. His duties necessitate driving on City streets one or two times a year. By his estimates a Bus Maintainer "A" would drive a maximum of one-half mile daily.

We have carefully reviewed the documentary and testimonial evidence presented to us. Appellant has demonstrated no psychological nor drug-related difficulties since 1971. No medical disability has been diagnosed since that time. The Department relies primarily on Dr. Petrone's assertion of a 50 percent possibility of recurrence of appellant's disorder and on his concern that appellant's awareness and insight into his illness is low due to his lack of follow-up treatment. This concern, we believe, has been rebutted by appellant's record over the past fifteen years. He has had an exemplary record with the Transit Authority. During that time he has been responsible for driving buses throughout the depot. His duties as a Bus Maintainer "A" would involve few changes from his present position. Only rarely would he be responsible for driving on City streets; these occasions would not involve transporting passengers. His primary driving responsibilities would be within the depot; therefore, the public will not be exposed to risk.

We, therefore, conclude that appellant is capable of performing the duties of a Bus Maintainer "A" at the present time. We also believe that appellant possesses no mental disability that can reasonably be expected to prevent him from carrying out the responsibilities in the future. The above analysis of the evidence sufficiently distinguishes this

case from *Hansen v. New York City Civil Service Commission*, Index No. 20523/84 (Sup. Ct. NY County, May 6, 1985) and *Application of the State Division of Human Rights on the Complaint of Peter Granelle v. City of New York*, N.Y.L.J. June 27, 1986 (App. Div. 1st Dept.). Thus, their holdings do not apply in this case. Accordingly, we reverse the determination of the Personnel Director and find appellant qualified for the position of Bus Maintainer "A".

Mark D. Lebow, Chairman
Harry Amer, Vice Chairman
Frank X. Gargiulo, Commissioner
Juanita E. Watkins, Commissioner

APPENDIX F

U.S. Constitution, Amendment XIV, § 1 (Due Process Clause)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

42 U.S.C. § 1983 (1982)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

APPENDIX H

New York Constitution, Article V, § 6 (McKinney 1987 & Supp. 1989)

§ 6. [Civil service appointments and promotions]

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive....

APPENDIX I

New York Civil Service Law §§ 50(4); 56; and 61(1)

N.Y.Civ. Serv. L. § 50(4) (McKinney 1983 & Supp. 1989)

§ 50. Examinations generally

* * *

4. Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible

(a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies; or

(b) who is found to have a physical or mental disability which renders him unfit for the performance of the duties of the position in which he seeks employment, or which may reasonably be expected to render him unfit to continue to perform the duties of such position....

* * *

No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

N.Y. Civ. Serv. L. § 56
(McKinney 1983)

§ 56. Establishment and duration of eligible lists

The duration of an eligible list shall be fixed at not less than one nor more than four years; provided that, except for lists promulgated for police officer positions in jurisdictions other than the city of New York, in the event that a restriction against the filling of vacancies exists in any jurisdiction, the state civil service department or municipal commission having jurisdiction shall, in the discretion of the department or commission, extend the duration of any eligible list for a period equal to the length of such restriction against the filling of vacancies. Restriction against the filling of vacancies shall mean any policy, whether by executive order or otherwise, which, because of a financial emergency, prevents or limits the filling of vacancies in a title for which a list has been promulgated. An eligible list that has been in existence for one year or more shall terminate upon the establishment of an appropriate new list, unless otherwise prescribed by the state civil service department or municipal commission having jurisdiction.

N.Y. Civ. Serv. L. § 61(1)
(McKinney 1983)

§ 61. Appointment and promotion

1. Appointment or promotion from eligible lists. Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion; provided, however, that the state or a municipal commission may provide, by rule, that where it is necessary to break ties among eligibles having the same final examination ratings in order to determine their respective standings on the eligible list, appointment or promotion may be made by the selection of any eligible whose final examination rating is equal to or higher than the final examination rating of the third highest standing eligible willing to accept such appointment or promotion. Appointments and promotions shall be made from the eligible list most nearly appropriate for the position to be filled.

APPENDIX J

New York City Charter
§§ 810(a), 812(c) and 813(a)
(New York Legal Pub. Corp. 1989)

§ 810. Declaration of intent. a. The personnel policies and practices of the city government in furtherance of this charter, the civil service law and rules and other applicable law shall preserve and promote merit and fitness in city employment; ensure that appointments and promotions in city service are made without regard to political affiliation, and without unlawful discrimination based on sex, race, religion, national origin, disability, age or sexual orientation; and promote and support the efficient and effective delivery of services to the public.

§ 812. City civil service commission.

* * *

c. The civil service commission shall have the power to hear and determine appeals by any person aggrieved by any action or determination of the personnel director made pursuant to paragraphs three, four, five, six, seven and eight of subdivision a or paragraph five of subdivision b of section eight hundred thirteen of this chapter and may affirm, modify, or reverse such action or determination. Any such appeal shall be taken by application in writing to the commission within thirty days after the action or determination appealed from. The commission shall also have the powers and responsibilities of a municipal civil service commission under section seventy-six of the state civil service law.

§ 813. Personnel director; powers and duties. a. The personnel director shall have the following powers and duties in addition to the powers and duties of a municipal civil service commission provided in the civil service law, and those vested in the personnel director as the head of the department, except where any specific power or duty is assigned to the mayor, heads of city agencies or the civil service commission pursuant to this chapter:

* * *

(4) To establish, promulgate and certify eligible lists in the manner provided in the civil service law, and the rules of the personnel director;

* * *

(6) To investigate applicants for positions in the civil service; to review their qualifications, and to revoke or rescind any certification or appointment by reason of the disqualification of the applicant or appointee under the provisions of the civil service law, and the rules of the personnel director or any other law....

APPENDIX K

Rule 3.6 of the Rules and Regulations of the New York State Department of Civil Service, N.Y. Comp. Codes R. & Regs. tit. 4, § 3.6 (1988)

§ 3.6 Establishment of eligible lists

Every candidate who attains a passing mark in an examination as a whole and who meets the standards prescribed, if any, for separate subjects or parts of subjects of the examination shall be eligible for appointment to the position for which he was examined and his name shall be entered on the eligible list in the order of his final rating; but if two or more eligibles receive the same final rating in the examination, they shall be ranked in accordance with such uniform, impartial procedure as may be prescribed therefor by the Civil Service Department.

APPENDIX L

Rule 8.3.3 of the Rules and Regulations of the City Personnel Director, Department of Personnel of the City of New York

Rule VIII, § 3: Appeals to the City Civil Service Commission

§ 8.3.3. Appeal From Disqualification

(a) A person who has been disqualified by the city personnel director shall be entitled to make an appeal to the commission provided that such appeal is made in writing within thirty days after the date of notification to such person of such disqualification.

(b) However, such an appeal must be made in writing within two weeks after such date of notification where disqualification was on the grounds that the appellant was found to lack any of the established requirements for admission to the examination or for the position applied for.

(c) In connection with such appeal, the commission shall afford such appellant an opportunity to appear before the commission personally with representation by counsel or other person selected by the appellant for the purpose of making oral or written argument on her or his behalf; but unless the appellant has completed the probationary period, such person shall not be entitled to make such personal appearance if disqualified:

* * *

(2) because of a physical or mental disability or failure to meet the required medical or physical standards of a position....

89-201

No. 201

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

MELVIN DEAS,

Petitioner,

vs.

JUDITH LEVITT, In Her Official Capacity As City Personnel Director, and NEW YORK CITY DEPARTMENT OF PERSONNEL,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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October 6, 1989

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the New York Court of Appeals ruling that an applicants right to be considered for a civil service appointment is limited to the duration of the eligible list upon which his name appears - despite the applicants inability to obtain timely administrative relief to establish his qualifications for consideration - is in conflict with Logan v. Zimmerman Brush Co.?

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No. 201

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

MELVIN DEAS,

Petitioner,

vs.

JUDITH LEVITT, in Her Official Capacity As City Personnel Director, and NEW YORK CITY DEPARTMENT OF PERSONNEL,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

COUNTER STATEMENT OF THE CASE

Petitioner-appellant, Melvin Deas, employed by the New York City Transit Authority ("Transit Authority") as a Maintainer Helper B, applied for a promotion to the position of Bus Maintainer A in

October, 1983 (A5).[1] He passed the examination for the position and obtained a ranking of V3 on the eligible list established March 21, 1984 (A5). In August 1984, as part of the medical examination required for the position sought, petitioner was examined by a Transit Authority psychiatric consultant (A5). Based on that examination, the Transit Authority found petitioner, who had a history of schizophrenia and drug abuse, medically disqualified (A5-6).

In September, 1984, petitioner appealed the Transit Authority's decision to disqualify him to the New York City Department of Personnel ("Personnel") which conducted a second psychiatric examination in March, 1985 (A6). The Department of Personnel's psychiatric consulant also concluded that

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[1]References are to the Appellant's Appendix submitted to the New York Court of Appeals.

petitioner should be disqualified for the position due to the risk of recurrence of his psychopathology (A6). Accordingly, Personnel disqualified petitioner for promotion in April, 1985 (A7).

Thereafter, petitioner appealed Personnel's decision to the New York City Civil Service Commission ("Civil Service Commission") (A45). Petitioner requested a hearing in order to refute certain factual assertions in the Department of Personnel Medical Examining Division's memorandum (A18). A hearing was conducted on July 9, 1986 (A8).[2]

By decision dated August 14, 1986, the Civil Service Commission overturned the

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[2]At the request of counsel for Personnel who was unable to meet with that agency's psychiatric consultant, petitioner agreed to adjourn the hearing from June 18, 1986 to July 9, 1986 (A8).

medical disqualification of petitioner, stating (A26):

> We have carefully reviewed the documentary and testimonial evidence presented to us. Appellant has demonstrated no psychological nor drug-related difficulties since 1971. No medical disability has been diagnosed since that time. The Department relies primarily on Dr. Petrone's assertion of a 50 percent possibility of recurrence of appellant's disorder and on his concern that appellant's awareness and insight into his illness is low due to his lack of follow-up treatment. This concern, we believe, has been rebutted by appellant's record over the past fifteen years. He has had an exemplary record with the Transit Authority. During that time he has been responsible for driving buses throughout the depot. His duties as a Bus Maintainer "A" would involve few changes from his present position. Only rarely would he be responsible for driving on City streets; these occasions would not involve transporting passengers. His primary driving responsibilities would be within the depot; therefore, the public will not be exposed to risk.
>
> We therefore, conclude that appellant is capable of performing the duties of a Bus Maintainer "A"

> at the present time. We also believe that appellant possesses no mental disability that can reasonably be expected to prevent him from carrying out the responsibilities in the future.

Pursuant to Article 78 of the CPLR, the Department of Personnel had four months to consider whether to appeal the Civil Service Commission decision. On September 4, 1986, Personnel advised petitioner that it had decided not to appeal the Civil Service Commission decision and would have petitioner certified for the position of Bus Maintainer A (A9). Thereafter, the Department of Personnel learned that it was unable to certify petitioner. In July 1986, a new examination had been administered for the Bus Maintainer A position (A9).[3] Thus, the list on which petitioner's name appeared

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[3]Nowhere in the petition was it alleged that petitioner took this examination.

had expired on August 26, 1986, and a new list was established (A10, 45).

Accordingly, on September 5, 1986, the Department of Personnel informed petitioner that he was no longer eligible for the position he sought, and would not be certified (A9). By letter dated September 16, 1986, counsel for petitioner requested that the Department of Personnel place petitioner on a "special eligible list" (A10, 32). By letter dated September 26, 1986, Personnel informed petitioner that it had no authority to establish a "special eligibility list" and that "with the termination of the eligibility list, Mr. Deas' eligibility came to an end" (A39).

On January 9, 1987, petitioner instituted this Article 78 proceeding (A1), alleging that the respondents' failure to certify him based on the expiration of the eligible list was arbitrary and capricious

(A12) and violated petitioner's rights under the due process clauses of the New York State and United States Constitutions (A13). Respondents on March 9, 1987, cross-moved to dismiss the petition for failure to state a cause of action (A41).

OPINIONS BELOW

Special Term

In a decision dated May 6, 1987, Special Term granted the motion to dismiss the petition (A49). The Court reviewed the facts as follows (A50):

> In early 1984 Petitioner was a candidate for the Civil Service position of Bus Maintainer A within the New York City Transit Authority. Petitioner was found disqualified medically in September 1984. After an appropriate appeal to the Department of Personnel in March, 1985, he was found medically acceptable on August 14, 1986. Twelve days later a new list for the same position was promulgated inasmuch as the list

for which Petitioner competed expired on August 6, 1986.[4]

The Court found that petitioner's due process claims were "without merit" (A50). Special Term rejected petitioner's allegation that the Department of Personnel action was arbitrary and capricious, stating that "[t]he function of judicial review in an Article 78 proceeding is not to weigh the facts and merits de novo and substitute the Court's judgment for that of the agency's determination, but rather to decide whether such can be supported on any reasonable basis" (A50).

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[4]The date of August 6, 1986, recited by the Court above, is apparently a typographical error as the list, in fact, expired on August 26, 1987 (A9). As the Court noted that the list expired twelve days after the Civil Service Commission decision, it was clearly aware of the timing of the expiration.

Appellate Division

The Appellate Division, First Department, reversed, in a two justice plurality opinion, ruling that the petitioner had been deprived of due process of law by respondents' inability to give effect to his successful administrative appeal because of the expiration of the eligible list on which his name appeared. Although the Court recognized that the petitioner did not possess a property right to appointment, it stated that 'he does possess a property right to be considered for the appointment in question" (A86). The Court further found that, pursuant to Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982), "the right to utilize adjudicatory procedures established by state law also constitutes a property interest" (A86).

The Court further found that respondents' procedure was invalid because

of the failure to provide the petitioner with notice that his right to appeal was limited by the life of the list.

In a dissenting opinion, two justices found that, under New York law, any right the petitioner had to seek administrative review of his disqualification was necessarily limited by the life of the list on which his name appeared. The dissenters also found that petitioner was not entitled to notice of the expiration of the eligible list upon which his name appeared, since he was represented by an attorney and could be expected to know that under New York law, eligible lists are of limited duration.

New York Court of Appeals

In a 4 to 2 decision (one judge concurring in the result), the New York Court of Appeals reversed the order of the Appellate Division. The Court reviewed its prior decisions which had uniformly held that

appointment from an expired civil service list was "a legal impossibility". The reason for that rule, the Court noted, was that the value of a competitive examination demonstrating merit and fitness for a position diminishes over time. At a later time, other candidates who have taken a more recent examination may be better prepared or more fit to fill a position.

The majority next discussed the narrow exception to this rule which it would continue to allow. Appointment to a special eligible list would be made in the case of an applicant who, prior to the expiration of the list, challenges the validity of the list itself, asserting that the state constitutional merit and fitness requirements have been violated and unqualified individuals are thus obtaining civil service employment.

The Court then determined that the above-noted rule and limited exception did

not violate Federal due process. That was so because under the New York law applicants who successfully pass a civil service examination do not possess any mandated right to employment or any other legally protectible interest. They have at most a unilateral expectation that they will be considered for appointment. The majority further stated that whatever property interest petitioner might have had to be considered for appointment was limited by the life of the eligible list on which his name appeared.

The majority distinguished this Court's holding in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Unlike the property interest at stake in Logan, the majority wrote, the requirement that a civil service applicant demonstrate eligibility prior to the expiration of the eligible list is not a procedural limitation, but is part of New

York's definition of the property interest. In the instant case, the majority asserted, petitioner's asserted property interest was, substantively, of no greater duration than the life of the eligible list. And, unlike the 120-day deadline provision in Logan which advanced no State interest, New York's rule that civil service applicants be appointed from the most recent list promotes New York's constitutional directive.

The majority also found that there was no constitutional prohibition against distinguishing between applicants who have attacked the validity of the list prior to its expiration as being in derogation of New York's constitutional merit and fitness requirement and those who have only alleged they have been wrongly ruled ineligible for medical or similar reasons.

The two dissenters in the Court of Appeals disagreed with the majority as to the

substance of the property interest involved in this case and the circumstances under which, as a matter of New York law, the duration of an eligible list should be extended. The dissenters found that the alleged error made here as to petitioner's individual qualifications was sufficient to implicate the constitutional validity of the entire eligible list and thus, in their view, the petitioner had been denied relief solely on the basis of his failure to commence a timely judicial proceeding. The dissenters held that the above ground constituted a violation of petitioner's due process rights under this Court's decision in Logan.

REASONS FOR DENYING THE WRIT

THE NEW YORK COURT OF APPEALS HOLDING THAT PETITIONER'S PROPERTY INTEREST IN BEING CONSIDERED FOR CIVIL SERVICE APPOINTMENT WAS NECESSARILY LIMITED BY THE LIFE OF THE ELIGIBLE LIST DETERMINED A QUESTION PROPERLY COMMITTED TO STATE LAW. THERE IS NO BASIS HERE FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

Article V, §6 of the New York State Constitution provides in pertinent part, "Appointments and promotions in the Civil Service of the state and all of civil divisions thereof *** shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." Pursuant to this provision, periodic examinations are given to candidates for appointment and promotion in the civil service and, after the results of an examination are calculated, an eligible list is established which places the successful candidates in order of their

grades. The list continues for not less than one nor more than four years. An eligible list that has been in existence for one year or more terminates upon the establishment of a new list "unless otherwise prescribed by the state civil service department or municipal commission having jurisdiction" (Civil Service Law §56). Appointments must be made from names appearing on the list but the appointing authority is free, in its discretion, to select any one of the top three candidates.

The New York Court of Appeals has consistently interpreted these provisions for many years to mean that an applicant for a civil service promotion in New York has no property interest under New York law to that appointment. See, Hurley v. Board of Education of the City of New York, 270 NY 275 (1936); Cassidy v. Municipal Civil Serv. Commn., 37 NY2d 526 (1975). The Court

found that such applicant has at most a right to consideration for and a hope of appointment, but not a claim of entitlement. And whatever property interest an applicant has to be considered for appointment is limited to the life of the eligible list upon which his name appears. With the property interest so circumscribed, it necessarily follows that petitioner was not denied due process of law when the Department of Personnel was unable to certify his name for promotion because the eligible list had expired.

Petitioner erroneously argues that the limitation placed upon an applicant's right to be considered for appointment is actually procedural in nature and that it results in an arbitrary deprivation of property without furthering any valid governmental purpose. Such deprivation, petitioner argues, violates his right to due process of law, as did the

deprivation of property which occurred in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

Under New York law, petitioner's right to utilize and obtain relief as a result of the administrative relief procedures is limited to the life of the eligible list. This limitation is one of substance and is part of New York's definition of the property interest. The Logan decision is not at all apposite.

In Logan, supra, state law provided the claimant with the right to review of his claim of employment discrimination. The review procedures required that a fact-finding conference be scheduled within 120 days. Through inadvertence, the state agency neglected to schedule the conference until beyond the 120 day period, resulting in the dismissal of Mr. Logan's claim for lack of jurisdiction. This Court ruled that Mr. Logan's right to consideration of his claim

under the state scheme was a property right which the state had deprived him of in an arbitrary and random manner by its rigid application of the 120 day limitation.

The instant case differs considerably from Logan, in that the petitioner here has no property interest under state law in the review of his disqualification and the implementation of an administrative ruling in his favor.

New York law affords petitioner only an appellate opportunity circumscribed by the life of the eligible list on which his name appeared. The instant case is thus more like Martinez v. California, 444 U.S. 277 (1980), which held that the application of a state immunity statute to defeat a tort claim was not unconstitutional. The Court stated, id., at 282:

> the immunity defense, like an element of the tort claim itself, is merely one aspect of the state's definition of that property interest

> . . . when state law creates a cause of action, the state is free to define the defenses to the claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law.

The holding of the New York Court of Appeals is thus perfectly in accord with the teachings of this Court which has consistently refrained from finding within the due process clause of the Fourteenth Amendment a source of property rights.

As this Court stated in Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .

See also, Cleveland Board of Education v. Loudermill, 470 U.S. 532. Accord, Koscherak v. Schmeller, 363 F. Supp. 932, 936 (S.D.N.Y. 1973) (three-judge court) aff'd 415 U.S. 943 (1974).

Moreover, unlike Logan, in which the state's interest in the 120 day limit was found to be insubstantial, the limitation on the relief herein is grounded in Article V, §6, of the New York State constitution and strong public policy considerations favoring appointment off current lists. Indeed, compelling the Department of Personnel to revive expired lists or create a special eligibility list for every successful administrative appeal would be contrary to the law and public policy of New York State which requires City agencies to hire only those candidates found to be most qualified as a result of recent examinations. See Hurley v. Board of Education of the City of New York, 270 N.Y. 275 (1936).

Nor is it arbitrary or irrational for the State to allow the eligible list to be extended only for those applicants who bring a timely judicial challenge and successfully establish

the constitutional invalidity of the list itself and not merely error in their own designation as unqualified. Every extension of an eligible list, while desirable from the point of view of an individual applicant, exacts a price. It causes delay in filling vacant positions, which may have to be "saved" in case administrative and judicial review procedures later establish an applicant's qualifications. If, alternatively, the applicant is placed on a special eligible list, he will be considered for appointment before those who took a later, different competitive examination. Those applicants may be more qualified and deserving, at that point in time, of the appointment. The harshness to the applicant who, without fault, finds himself too late for certification is ameliorated by his ability to sit for the new competitive examination, with the question of his qualifications now settled.

The State may rationally distinguish the different situation where a timely judicial challenge to the list is made which demonstrates that the list itself is constitutionally invalid. In such a case, the entire rank order of the list is put into question and unqualified applicants may be appointed to permanent, tenured positions. Just as the State's merit and fitness requirements are furthered by not extending the eligible list in the first situation, an exception to the rule and extension of the list furthers the State's interest in the second. The rules defined by the Court of Appeals consistently advance legitimate State interests and provide no basis for petitioner to complain of constitutionally proscribed unequal treatment.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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